Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

THE UNIVERSITY OF MINNESOTA AND REGENTS OF THE UNIVERSITY OF MINNESOTA; WENDELL R. ANDERSON, *et al.*,

Petitioners,

v.

IAN MAITLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the doctrine of legislative immunity bar 42 U.S.C. § 1983 claims against individual members of state university and similar special jurisdiction governing boards for their legislative acts?

2. Does the Eleventh Amendment bar Title VII sex discrimination claims against states?

LIST OF PARTIES

Parties not listed on the cover page include the following Petitioners:

M. Elizabeth Craig; Jean B. Keffeler; Elton A. Kuderer; H. Bryan Neel; Mary J. Page; Lawrence Perlman; Thomas R. Reagan; David K. Roe; Darrin M. Rosha; Stanley D. Sahlstrom; Ann J. Wynia; Julie Bleyhl; William E. Hogan, III; Hyon T. Kim; William Peterson; Nils Hasselmo, University of Minnesota President.

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Petitioners Board of Regents of the University of Minnesota; Wendell R. Anderson; M. Elizabeth Craig; Jean B. Keffeler; Elton A. Kuderer; H. Bryan Neel; Mary J. Page; Lawrence Perlman; Thomas R. Reagan; David K. Roe; Darrin M. Rosha; Stanley D. Sahlstrom; Ann J. Wynia; Julie Bleyhl; William E. Hogan, III; Hyon T. Kim; William Peterson; and Nils Hasselmo, former University of Minnesota President respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the court of appeals in *Maitland v. University of Minnesota* was filed August 15, 2001 and is reported at 260 F.3d 959 (8th Cir. 2001).[1] Appendix ["App."] 1a. The order denying the Petitioners' petition for rehearing *en banc* was entered October 5, 2001 and is unreported. App. 29a. The decision of the district court was entered March 29, 2000 and is unreported. App. 13a.

STATEMENT OF JURISDICTION

The court of appeals filed its decision on August 15, 2001 and issued its order denying rehearing *en banc* on October 5, 2001. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

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1. Previous Eighth Circuit opinions ruling on other issues in *Maitland v. University of Minnesota* are reported at 155 F.3d 1013 (8th Cir. 1998), and 43 F.3d 357 (8th Cir. 1994).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States – Amendment XI

The Eleventh Amendment provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

Constitution of the United States – Amendment XIV, Sections 1, 5

The Fourteenth Amendment, Section 1 provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Fourteenth Amendment, Section 5 provides:

> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Civil Rights – 42 U.S.C. § 1983

Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof, to the deprivation of any rights, privileges, or immunity secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress. For the purpose of this section, any Act of Congress applicable to the District of Columbia shall be considered to be a statute of the District of Columbia.

Civil Rights – 42 U.S.C. §§ 2000e, 2000e-2, 2000e-5 (*see* App. F at 37a).

STATEMENT OF THE CASE

1. The Parties. Respondent Ian Maitland is a male University of Minnesota ("University") faculty member.

The University is a constitutionally established, autonomous arm of the State of Minnesota. *See Treleven v. Univ. of Minn.*, 73 F.3d 816, 818-19 (8th Cir. 1996). The University was established by Charter in 1851. App. 31a. The University's Twin Cities campus is the fourth largest public educational institution in the United States, employing 17,400 people and maintaining a $1.8 billion annual budget.

All but one of the individually named Petitioners are past and present Regents of the University. Regent positions are part-time and unpaid. App. L-19, L-21. The Regents are

elected by the Minnesota Legislature to six-year terms. App. 31a-32a. Like other elected officials, the Regents can be removed from office by the Legislature for "malfeasance or nonfeasance in the performance of their duties." MINN. CONST. art. VIII, § 5.

Pursuant to the University Charter, the Board of Regents ("Board") has plenary authority over all affairs of the University. App. 33a; *see Winberg v. Univ. of Minn.*, 499 N.W.2d 799, 803 n.3 (Minn. 1993) (reaffirming that the entire control of University affairs is conferred on the Board). The Charter specifically empowers the Board to "enact all laws governing the University." App. 33a. These laws are codified as "Regents' Policies." App. L-16. The Board has delegated all authority for administrative functions to University officers and employees, reserving to itself governance and policy decision-making authority. The Board makes all major policy and long-range planning decisions, and has the primary fiduciary responsibility for the welfare of the University, including the responsibility to establish budget priorities. App. L-2.

The remaining individually named Petitioner was the President of the University at the time relevant to this dispute. The University President is elected by the Board and is responsible for introducing a budget to the Board and carrying into effect the laws enacted by the Board. App. L-4 - L-5. As to settlement of claims, Regents' Policy requires that the President consult with the Board concerning any settlement having significant policy or financial implications, and to follow its instructions. App. L-14.

2. The *Rajender II* Consent Decree. In 1989, after nearly sixteen years of complex litigation, the Board entered into a federal district court-approved consent decree settling a class-action sex discrimination lawsuit brought by numerous female academic employees, known as *Rajender II*.

The factual predicate of the settlement was a set of statistical studies of wage data over several years conducted by both sides. The studies differed in their use of certain variables and yielded different results. In approving the settlement and consent decree, the federal district court found that the settlement resulted from a compromise between the parties, and that the parties' statistical analyses provided "strong support" for the proposed settlement.

3. The Regents' Legislative Action. The *Rajender II* consent decree mandated a substantial restructuring of faculty base-pay rates at the University, resulting in a six-percent increase of female faculty salaries. All settlements involving a "significant financial impact," or "a significant change in University-wide policy" must be approved by the Board. App. L-14. Accordingly, Board action was required to approve the *Rajender II* settlement. Similarly, the Board approved President Hasselmo's special budget proposal to accommodate the three million dollar pay increase in the University's overall spending necessitated by the settlement.

The salary adjustment mandated by the settlement affected hundreds of female faculty members across dozens of University departments, and was distributed according to a three-part formula designed to correct historic pay inequities based on gender. These base-pay increases were integrated into all subsequent salary policy decisions. The consent decree also included a "manifest inequities" provision that provided that the University "may grant a higher regular increase to an academic employee (whether a man or a woman) to offset [any] manifest inequity" created by the salary distributions under the settlement. The decree provided a process by which employees could file a "manifest inequity" claim if they believed they had been aggrieved. Respondent never filed such a claim.

4. This Litigation. More than three years after the *Rajender II* settlement, in 1993, Respondent brought this federal court action alleging that the consent decree discriminated against him as a male faculty member in violation of Title VII of the 1964 Civil Rights Act and 42 U.S.C. § 1983.[2] App. 15a-16a. In this action Respondent questions the motives of the individually named Regents and University President, and accuses them of intentionally and maliciously discriminating against him by adopting the settlement and establishing new pay rates for University employees consistent with the consent decree. Respondent is also suing the University for retroactive relief under Title VII. Respondent seeks punitive and compensatory damages from the individual Regents and the University President, and compensatory damages from the University.

Respondent also petitioned the district court for class certification seeking retroactive relief for all male faculty members under Title VII. Respondent's class certification petition was denied by the district court. App. 27a. The Eighth Circuit refused to hear his interlocutory appeal. However, Respondent may appeal the denial of class certification after trial. 28 U.S.C. § 1291 (1993). This case, therefore, involves a potential remedy under Title VII amounting to a six-percent pay increase for a class numbering over one thousand academic employees of the University retroactive over several years.

Petitioners moved the district court for dismissal, or in the alternative, partial summary judgment, on the basis that Respondent's § 1983 claim was barred by the individual Regents' and the University President's legislative immunity, and that Respondent's Title VII claim was barred by the University's Eleventh Amendment immunity. The district court denied Petitioners' motion.

---

2. The U.S. District Court for the District of Minnesota has federal question jurisdiction over Respondent's claims pursuant to Title VII of the 1964 Civil Rights Act and 42 U.S.C. § 1983.

The court of appeals affirmed, holding that the Regents and University President are not entitled to legislative immunity because they are "essentially administrators." Rather than follow the functional analysis required by this Court's decision in *Bogan v. Scott-Harris*, 523 U.S. 44 (1998), the court of appeals adhered to its categorical ruling in an earlier unrelated case that legislative immunity does not apply to "the governing body of a state-supported institution of higher learning." *Maitland*, 260 F.3d at 962 (citing *Stanley v. Magrath*, 719 F.2d 279, 284-85 (8th Cir. 1983)); *see also* App. 6a. The court of appeals did not even discuss whether settling a large class action lawsuit and substantially restructuring the compensation parameters for thousands of employees was a legislative act.

The court of appeals also held that the Eleventh Amendment does not bar Title VII sex discrimination claims against states. The court relied in large part on this Court's decision in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). The court did not discuss this Court's more recent Eleventh and Fourteenth Amendment jurisprudence which is directly relevant to this issue.

REASONS FOR GRANTING THE WRIT

This case presents two questions that warrant review by this Court. First, the Eighth Circuit decided the important federal question of legislative immunity in direct conflict with relevant decisions of this Court and in direct conflict with several other courts of appeal that have addressed the issue.

Second, the Eighth Circuit failed to follow the congruence and proportionality test and related Eleventh Amendment jurisprudence of this Court in determining whether the Eleventh Amendment bars sex discrimination claims against the states. In so doing, the Eighth Circuit undercut fundamental principles of the Eleventh Amendment articulated by this Court.

1. The Court of Appeals Decision Contradicts Supreme Court Precedent and the Principles of Legislative Immunity.

The writ should be granted first because the Eighth Circuit's decision in this case directly conflicts with this Court's ruling in *Bogan v. Scott-Harris*, and related Supreme Court jurisprudence. In *Bogan*, this Court declared that "[w]hether an act is legislative turns on the nature of the act." 523 U.S. at 54. This Court also held that legislative immunity "attaches to all actions taken 'in the sphere of legitimate legislative activity.'" *Id.* (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)).

Ignoring the functional approach required by *Bogan*, the Eighth Circuit followed its own categorical rule that legislative immunity can never protect public university governing board members without discussing whether settling a far-reaching class-action lawsuit was a legislative act. *See Maitland*, 260 F.3d at 962-63; *see also* App. 5a. The Eighth Circuit relied on its previous decision in *Stanley v. McGrath*, which held:

> There are instances in which the members of bodies other than state legislatures may have legislative immunity from suit under Section 1983. The governing body of a state-supported institution of higher learning, we think, cannot qualify for such protection.

719 F.2d at 284-85. This holding was based on the Eighth Circuit's view that though "the Regents are given the power 'to enact laws for the government of the University' they are essentially administrators who oversee the operation of a state educational institution." *Id.* This categorical conclusion about

the nature of the Regents' responsibilities and authority does not permit a functional analysis of the specific action taken.

Bogan forecloses continued reliance on the categorical approach previously employed by the Eighth Circuit in *Stanley*. *Bogan* not only applied legislative immunity to local legislators, but also stated a broader principle clearly applicable here:

> *Regardless of the level of government*, the exercise of legislative discretion should not be inhibited by judicial interference or distorted by the fear of personal liability. . . . [A]ny restriction on a legislator's freedom undermines the public good.

Bogan, 523 U.S. at 52 (emphasis added) (quoting *Spallone v. United States*, 493 U.S. 265, 279 (1990)). This Court thus affirmed that the principles of legislative immunity extend to officials at all levels of government when they exercise legislative discretion. Accordingly, pursuant to *Bogan* legislative immunity turns on whether the public official's action in a particular case is legislative in nature.

Whether an individual is a member of a governmental body not traditionally recognized as legislative is immaterial. This Court has written a clear and consistent progression of decisions regarding this issue. Leading to *Bogan*, this Court had applied legislative immunity to the legislative acts of members of Congress,[3] state legislators,[4] regional governing board members,[5] and state judges.[6] In *Bogan*, this Court applied

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3. *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880).

4. *Tenney*, 341 U.S. at 379.

5. *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 406 (1979).

6. *Supreme Court of Virginia v. Consumers' Union of the United States, Inc.*, 446 U.S. 719, 734 (1980).

the doctrine to local legislators. *Bogan*, 523 U.S. at 52. Elected Regents exercising legislative power over multi-campus state universities and similar special jurisdiction governing boards cannot, and should not, categorically be denied similar protection.

The Eighth Circuit's view that Regents are "essentially administrators" not only conflicts with the progression of cases decided by this Court from *Kilbourn* to *Bogan*, but also deeply misconceives the nature and function of the governing boards of large public universities. The University Charter provides that the "Regents shall have power, and it shall be their duty to enact laws for the government of the University." App. 33a. The laws enacted by the Regents are codified as "Regents' Policies." App. L-16. In enacting these laws, the Regents have delegated all authority for executive and administrative matters to senior University officers, reserving to itself governance and policymaking responsibilities, including:

> (1) approving "major policies, long-range plans, educational programs and annual budgets, while clearly delegating administrative responsibilities";
>
> (2) understanding "that the Regents' role is policy making and not involvement in administration or the management process"; and
>
> (3) representing "all the people of Minnesota and no particular interest, community or constituency."

App. L-2 - L-3. The Regents bear every characteristic of a traditional legislative body and meet the indicia of immunity protection as articulated by this Court since *Kilbourn*.[7]

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7. Regents set the policy on University functions including academic freedom, intellectual property, student conduct, and endowment development. App. L-16. In setting these policies and (Cont'd)

The Board functions as the exclusive body to establish laws and governing policies for the University, and exercises oversight of senior officers' actions in order to ensure accountability. App. 33a. The public interest in providing certain government officials with legislative immunity is as strong or stronger in the case of university regents as it is with local and regional lawmakers.

The Eighth Circuit's decision also undermines important principles of legislative immunity enunciated by this Court. In recognizing that the American system of government is not consonant with a judicial inquiry into legislative motives for the purpose of holding public officials liable for their legislative acts, this Court has established certain fundamental principles of the legislative immunity doctrine. First, it is the electoral process, not the judicial process that serves as a check on legislative abuse. Second, and perhaps more important, this Court has discussed at length how threats of liability deter public service (especially in offices where pecuniary benefits and prestige are not as great), and undermine the "public good." *See Bogan*, 523 U.S. at 52-53; *see also Tenney*, 341 U.S. at 377.

The principal check on legislative abuse is the electoral process.[8] Minnesota Regents are elected to their positions.

(Cont'd)
ensuring accountability in the University, the Board divides itself into policy committees including educational planning, facilities, faculty staff and student affairs, and finance and operations. App. L-5. These committees make reports and bring decisions to the full Regents Board. App. L-9. Regents' authority rests solely with the Board as a whole and not with individual members. App. L-5.

8. Even beyond the electoral process, Minnesota law protects the public interest in good government by specifying that Regents
(Cont'd)

The Minnesota Legislature elects Regents to six-year terms at a biennal joint convention of the Senate and House of Representatives, upon recommendation of the Regent Candidate Advisory Council. Minn. Stat. § 137.0245. Minnesota law requires one Regent to reside in each of Minnesota's eight congressional districts and four Regents to be elected at large, in order to ensure equal representation across the state. Minn. Stat. § 137.024. Vacant Regent positions are filled by an appointment of the Minnesota Governor for the remainder of that term, after which the Legislature elects a Regent to fill the position. App. 32a.

This electoral process closely models the procedure for electing U.S. Senators prior to passage of the Seventeenth Amendment in 1913. *See* U.S. CONST. art. I, § 3, cl. 1, *amended by* U.S. CONST. amend. XVII, § 1. The Constitution grants and this Court recognized, Senators' absolute legislative immunity under the original election process. *See* U.S. CONST., art. I, § 6; *Kilbourn*, 103 U.S. at 201-04.

Moreover, in ruling that members of the Tahoe Regional Planning Agency and members of the Virginia Supreme Court were protected by legislative immunity, this Court recognized that direct election is not necessary to be responsible to the public. *See Supreme Court of Virginia*, 446 U.S. at 734; *Lake Country Estates*, 440 U.S. at 407 (Marshall, J., dissenting) (noting that the Court provided immunity to a board where six of ten members were appointed by local governments,

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(Cont'd)
can be removed from office for cause. Minn. Stat. § 137.09 (2000). Article 8, Section 5 of the Minnesota Constitution permits removal of Regents for "malfeasance or nonfeasance in performing their duties." This is similar to Article II, section 4 of the United States Constitution which calls for the removal of "officers" impeached for and convicted of "high crimes and misdemeanors," or Members of Congress who may be "punish[ed] . . . for disorderly behavior." *See* U.S. CONST. art. I, § 5, cl. 2.

two were appointed by governors, and two were state administrators serving *ex officio*).

Subjecting the individually named Regents to liability violates a second underlying principle of legislative immunity. Exposing university governing board members to personal liability would have a powerful and debilitating deterrent effect. Minnesota Regent positions are part-time and unpaid. App. L-19 - L-21. Respondent Maitland is seeking punitive and compensatory damages against the Regents as individuals, and has petitioned for class status, seeking to represent over one thousand male faculty members. App. 25a. The scale of the potential liability for individual Regents chills the incentive to serve on the Board and injures the public interest in effective policymaking. This chilling effect is especially powerful for governing board members of major public universities that are frequently engaged in litigation.

Lawsuits against individual state university board members exposes them not only to large-scale personal financial loss, but to potential reputational harm and time consuming, invasive discovery. As this Court stated in *Bogan*, "the time and energy required to defend against a lawsuit are of particular concern at the local level where the part-time citizen-legislator remains commonplace." 523 U.S. at 52. Here, as in *Bogan*, it is of "particular concern" not only that the time and energy of part-time, volunteer citizen legislators might be diverted from their important public responsibilities, but that the threat of personal liability "may significantly deter service" on the Board of Regents. *Id.*

Yet another reason for granting the writ is that all other federal and appellate courts addressing the issue of legislative immunity have applied *Bogan* differently than has the Eighth Circuit. Every other circuit considering the issue has interpreted *Bogan* to require a functional analysis of the specific legislative action taken and not a categorical

determination that the governmental body at issue is not legislative. Although most circuit-level cases do not specifically address the immunity afforded an entity that governs a public educational institution, the First,[9] Second,[10] Third,[11] Sixth,[12] and Eleventh[13] Circuits consistently apply a functional analysis of the nature of the act at issue regardless of the job title, the position held by the defendant, or the type of governmental entity. Moreover, the Ninth[14] and

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9. *Figueroa-Serrano v. Ramos-Alverio*, 221 F.3d 1, 4-5 (1st Cir. 2000) (holding that where an ordinance granted career status to two employee classes, the act was legislative and "[o]fficials performing legislative functions have absolute immunity from suit and liability under Section 1983").

10. *Morris v. Lindau*, 196 F.3d 102, 111 (2d Cir. 1999) (holding that town board members were absolutely immune for approving and administering an ordinance).

11. *Gallas v. Supreme Court of Pennsylvania*, 211 F.3d 760, 773-77 (3d Cir. 2000) (holding that the justices of the Pennsylvania Supreme Court were protected by absolute legislative immunity for eliminating one employment position because "[i]n determining whether an official is entitled to legislative immunity, [the court] must focus on the nature of the official's action rather than the official's motives or the title of his or her office").

12. *Canary v. Osborn*, 211 F.3d 324, 329-30 (6th Cir. 2000) (holding that school board members did not have legislative immunity in voting to demote an individual employee because "the action and substance was not essentially and clearly legislative," and assuming that school board members could have immunity).

13. *Macuba v. DeBoer*, 193 F.3d 1316, 1321 (11th Cir. 1999) (holding that county board members were entitled to legislative immunity for vote to eliminate position in land use department).

14. *San Pedro Hotel, Co. v. City of Los Angeles*, 159 F.3d 470, 476 (9th Cir. 1998) ("[L]egislators have absolute immunity when they 'act in their legislative capacities.'" (quoting *Chateaubriand v. Gaspard*, 97 F.3d 1218, 1220 (9th Cir. 1996)).

Tenth[15] Circuits have specifically cited *Bogan* to support a functional analysis of the nature of the act. The Eighth Circuit is now alone among the courts of appeal in determining legislative immunity on a categorical basis without regard to the nature of the act.

Recent circuit cases confirm that the Eighth Circuit's holding cannot be distinguished by the fact that the governmental body at issue is a public educational institution. Decisions in the Seventh[16] and Ninth[17] Circuits, for example, hold that individuals responsible for the governance of educational entities do qualify for legislative immunity.

Thus, not only has the Eighth Circuit contradicted the Supreme Court in *Bogan*, but it also is inconsistent with the other circuit courts in its application of Supreme Court precedent. The Eighth Circuit is an outlier on this issue and has subjected part-time, unpaid governing board members of a state government institution to personal liability for their policy decisions and legislative acts.

Finally, there can be little doubt that the action at issue in this case, approving the *Rajender II* settlement and

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15. *Kamplain v. Curry County Bd. of Comm'rs*, 159 F.3d 1248, 1251 (10th Cir. 1998) ("We look to the function that the Board members were performing when the actions at issue took place.").

16. *See Strasburger v. Bd. of Educ., Hardin County Comm. Unit Sch. Dist. No. 1*, 143 F.3d 351, 355 n.1 (7th Cir. 1998) (recognizing defense of legislative immunity for school board members, but finding it waived by defendants).

17. *Rounds v. Oregon St. Bd. of Higher Educ.*, 166 F.3d 1032, 1036 n.3 (9th Cir. 1999) (noting that some defendants, including University and Board of Higher Education officials, have legislative immunity, but not reaching whether the specific act at issue was legislative).

restructuring salaries for the faculty, is a legislative act, both substantively and formally. This Court has established four factors for determining whether a specific act is substantively legislative. The decision must be discretionary, set policy, have budgetary implications, and be prospective in nature. *See Bogan*, 523 U.S. at 55-56. In entering a consent decree and changing the wage structure for academic employees of the University for years to come, the Regents made a prospective, discretionary policy decision with significant budgetary implications. Courts recognize that salary decisions constitute legislative acts.[18] Indeed, the U.S. Constitution suggests that spending generally and fixing compensation specifically are legislative acts. *See* U.S. CONST. art. I, § 7, cl. 1; U.S. CONST. art II, § 1, cl. 7; U.S. CONST. art. III, § 1; U.S. CONST. amend. XXVII.

Moreover, the budgetary implications of the Regents' decision were very significant. The University President introduced a special budget to the Board to accommodate the three million dollar expenditure for wage increases, and these salary increases affected the recurring basic compensation rate of hundreds of female faculty members.[19]

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18. *See Bogan*, 523 U.S. at 46-47 (noting that although not directly at issue in the appeal, the challenged legislative actions included a salary freeze for city employees); *Berkley v. Common Council of the City of Charleston*, 63 F.3d 295, 302 (4th Cir. 1995) (holding that the city council's refusal to grant salary increases was a legislative act); *Rateree v. Rockett*, 852 F.2d 946, 950 (7th Cir. 1988) (holding that budgetary decisions affecting salaries are legislative in nature); *cf. Missouri v. Jenkins*, 495 U.S. 33 (1990) (finding a judicial order raising local taxes to finance court-ordered desegregation was an abuse of judicial discretion because spending is a quintessential legislative act).

19. Under *Bogan*, a chief executive is absolutely immune when proposing a budget plan and approving a legislative measure. In that

(Cont'd)

The base-pay increase affected all subsequent salary decisions, and thus had a permanent, significant budgetary effect.

In addition, the decision to enter the consent decree and change the salary structure was a prospective act. Three million dollars were distributed over a two-year period, while no back-pay was awarded for the faculty members. The base-pay distribution altered calculations for future wages for hundreds of faculty members. The Board had to consider all of these factors in determining whether to settle this lawsuit and alter wage policy at the University of Minnesota.[20] Entering into the consent decree constitutes a substantively legislative act.

Settling public lawsuits also is a formally legislative function. A decision to settle a lawsuit is undeniably discretionary. As this Court reaffirmed in *Bogan*, discretionary acts are absolutely immune while ministerial acts are not. *Id.* at 50-51. Settlements require appropriation of funds, may affect budgets, and may establish or influence policy such as

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(Cont'd)

case, a mayor's introduction of a budget and signature of an ordinance were found to be integral steps in the legislative process; the mayor could not be sued personally for damages. *See Bogan*, 523 U.S. at 55. Here, former President Hasselmo proposed the salary budget that funded the *Rajender II* settlement. Under *Bogan,* Respondent cannot sue President Hasselmo personally for damages for his role in the *Rajender II* settlement.

20. The Board's decision was analogous to the personnel decision at issue in *Bogan*. In *Bogan*, a vote to eliminate a position in a city's social services department qualified as a legislative act. 523 U.S. at 55-56. This Court distinguished the termination of this position, "which unlike the hiring or firing of a particular employee, may have prospective implications that reach well beyond a particular occupant for the office." *Id.* at 56. As in *Bogan*, the Regents' vote to permanently alter the University's salary structure affected more than one employee and one position, and was nothing like an administrative decision to hire or fire a particular employee.

gender equity. It is a legislative function to appropriate funds, approve budgets and set policy. *See id.* at 55-56.[21]

This Court recognized in *Bogan* the "venerable tradition" of legislative immunity and noted its vital importance to effective government and the public good. 523 U.S. at 48-49. It is a principle long recognized in Anglo-American law and is enshrined in Article I of the Constitution. The individually named Petitioners request the writ to be granted because the Eighth Circuit has issued a ruling inconsistent with this Court's legislative immunity jurisprudence and that of the other circuits. Unless this writ is granted, the unpaid, part-time public servants elected by the Legislature of the State of Minnesota to govern a vital arm of the State will remain exposed to personal liability for compensatory and punitive damages for discretionary policymaking decisions they made collectively as a governing board.

2. The Court of Appeals Decision Decides an Important Issue of Federal Civil Rights Law in Conflict with Supreme Court Eleventh Amendment and Fourteenth Amendment Jurisprudence since 1996.

This Court's recent Eleventh Amendment jurisprudence requires a reassessment of the question left open in *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 n.11 (1976) — whether sex discrimination claims brought against the states

21. Under Minnesota law, approval of settlements at all levels of government is a specific legislative function. In local units of government, a notice of a legal claim must be delivered to the governing body. Minn. Stat. § 466.05, subd. 1 (2001). Except for insured claims, any compromise of a claim must be approved by the governing body. *Id.* § 466.08. At the state level, prior to the 1970s, claims against the State of Minnesota had to be brought to the Legislature for consideration of settlement. Minn. Stat. § 3.732, subd. 5 (amended 1976). Even today, the Legislature retains sole authority to settle certain claims. *See, e.g.*, Minn. Stat. § 3.738, subd. 1 (1998) (regarding settlement of claims arising from injury or death of a patient or inmate).

under Title VII are within Congress' Section 5 power.[22] The writ should be granted in this case to decide this very important federal question, and to align the circuit courts' application of the Eleventh Amendment to sex discrimination claims with this Court's jurisprudence.

In *Fitzpatrick* this Court ruled that (1) Congress had clearly expressed its intent that states be subject to actions under Title VII; and (2) Congress could authorize the remedy of retroactive monetary relief when it validly exercises its Section 5 power. 427 U.S. at 456. This Court distinguished and clarified its then recent holding in *Edelman v. Jordan*, 415 U.S. 651 (1974). *Id.* The Court also stated that "Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts." *Fitzpatrick*, 427 U.S. at 456. However, *Fitzpatrick* did not squarely decide whether sex discrimination claims such as the one before it were actually valid exercises of Congress' Section 5 powers. Since 1976, this Court has further defined the limits of Congress's Fourteenth Amendment power to award retroactive relief against a non-consenting state, and this important issue now should be revisited and decided.[23]

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22. Even if *Fitzpatrick* were interpreted to have decided this issue, it must be revisited in light of this Court's more recent Eleventh Amendment jurisprudence.

23. Indeed, in *Fitzpatrick* this Court relied, in part, on its previous decision in *Parden v. Terminal Railway of Alabama State Docks Department*, 377 U.S. 184, 190 (1964), which held that Congress could abrogate immunity based on its Article I powers. This Court overruled *Parden* in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72-73 (1996), holding that Article I is not a valid basis for abrogating Eleventh Amendment immunity. Thus, this Court has already begun the reassessment of its holding in *Fitzpatrick*.

To abrogate the states' Eleventh Amendment immunity, Congress must "mak[e] its intention unmistakably clear in the language of the statute." *Atascadero St. Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). Petitioners do not dispute that Congress met this standard in enacting the 1972 amendments to Title VII.

The second and dispositive issue, however, is "whether Congress effectuated that abrogation pursuant to a valid exercise of constitutional authority." *Seminole Tribe*, 517 U.S. at 55. Article I of the Constitution is not a valid basis for Congress to abrogate Eleventh Amendment immunity. *See id.* at 72. This Court's early decision holding that the Civil Rights Act of 1964 is a valid exercise of Congress's Commerce Clause powers, *see Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257 (1964); *Katzenbach v. McClung*, 379 U.S. 294, 305 (1964), are irrelevant to the Eleventh Amendment. *Compare EEOC v. Wyoming*, 460 U.S. 226, 243 (1983) (holding that the ADEA was valid under the Commerce Clause), *with Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91 (2000) (striking down the ADEA against states as an invalid exercise of Fourteenth Amendment power). Congress purported to exercise its Fourteenth Amendment authority when it abrogated the states' Eleventh Amendment immunity from suits for sex discrimination. The court of appeals here determined that this abrogation is valid in Title VII sex discrimination claims. This holding is in error.

Following *Seminole Tribe*, this Court established in *City of Boerne v. Flores* that any legislation passed pursuant to the Fourteenth Amendment must have "congruence and proportionality" to a history of constitutional violations that the legislative remedies are intended to prevent. 521 U.S. 507, 534-35 (1997). The standard for determining whether Congress validly abrogated Eleventh Amendment immunity is the same standard for determining whether a statute is a valid exercise of Fourteenth Amendment power. *See Coll. Savs. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*,

527 U.S. 666, 672 (1999); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savs. Bank*, 527 U.S. 627, 636-37 (1999); *see also Seminole Tribe*, 517 U.S. at 59. This test requires an examination of the scope of the constitutional right that the legislation purports to protect and the historical problem Congress intended to address. *See City of Boerne*, 521 U.S. at 534-35.

Courts must first determine whether Congress identified a pattern of unconstitutional conduct that would warrant prophylactic legislation. *See id.* at 530-32; *see also Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001). Courts must then determine whether the remedies afforded by the legislation use a legal standard congruent to the constitutional standard at issue and whether the remedies are proportional to the harm created by the constitutional violations. *See City of Boerne*, 521 U.S. at 532-33. If these criteria are not satisfied, the congressional enactment is not a valid exercise of Section 5 powers.

In applying this test, this Court has articulated the reach of Eleventh Amendment immunity. *City of Boerne* struck down the Religious Freedom Restoration Act ("RFRA") and held that Congress had changed the substance of constitutional protections by establishing a strict scrutiny standard for any government action "substantially burden[ing]" religious exercise and unsupported by a history of violations.[24] *Id.* at 536.

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24. This Court first reviewed the limitations on Congress's enforcement power, then examined the constitutional standard for state actions interfering with religious practice (subjecting states to the rational basis standard of review). *See City of Boerne*, 521 U.S. at 529-30. Next the Court examined the congressional record of state interference, and held that Congress had insufficient findings to enact sweeping remedies, stating that "RFRA cannot be considered remedial, preventive legislation if those terms are to have any meaning." *Id.* at 532.

This Court then applied the *City of Boerne* test in *Florida Prepaid*. There, the Court observed that there was no relevant history of unconstitutional state conduct, either in *Boerne* or in the case before it, and concluded its analysis by demonstrating the lack of congruence between the statutory remedy and the constitutional standard. *Fla. Prepaid*, 527 U.S. at 639-40. Next, in *Kimel*, this Court struck down the Age Discrimination in Employment Act ("ADEA"), as applied to states, as an invalid exercise of Fourteenth Amendment enforcement power because the Act exposed states to liability wholly disproportionate to any congressional findings of age discrimination by state employers.[25] *See Kimel*, 528 U.S. at 91. In *Morrison*, this Court struck down the Violence Against Women Act ("VAWA"), finding that the Fourteenth Amendment did not permit Congress to create additional liability for individuals based on violent crimes directed toward women *qua* women. *See United States v. Morrison*, 529 U.S. 598, 625-27 (2000).[26]

Most recently in *Garrett*, this Court struck down the Americans with Disabilities Act ("ADA") as applied to states

25. This Court recognized its previous holdings that age-based discrimination fall under a rational basis standard of review. *See Kimel*, 528 U.S. at 83.

26. The Court declared that "the language and purpose of the Fourteenth Amendment place certain limitations on the manner in which Congress may attack discriminatory conduct. These limitations are necessary to prevent the Fourteenth Amendment from obliterating the Framers' carefully crafted balance of power between the States and the National Government." *Morrison*, 529 U.S. at 620. This Court also reiterated the "intermediate" standard of scrutiny applied in gender cases: "state-sponsored gender discrimination violates equal protection unless it 'serves important governmental objectives and . . . the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *See id.* (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

because the remedies created a higher level of scrutiny for state action which would "rewrite the Fourteenth Amendment." *Garrett*, 531 U.S. at 368. *City of Boerne* and its progeny have now clearly established the appropriate standards for deciding whether Congress has effectively abrogated the states' sovereign immunity from sex discrimination claims. The Eighth Circuit has failed to properly apply these standards.

First, sex discrimination claims under Title VII fail to meet the congruence and proportionality test established in *City of Boerne* because Congress created a remedy that is not provided by the Fourteenth Amendment. Specifically, Title VII allows disparate impact sex discrimination claims that are not viable under the Fourteenth Amendment. *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 274 (1979) (holding that the Fourteenth Amendment does not provide a cause of action for sex discrimination claims based on disparate impact); *accord Garrett*, 531 U.S. at 370.

The holding in *Feeney* must be read in light of *Griggs v. Duke Power Co.*, 401 U.S. 427 (1971). In *Griggs*, this Court interpreted Title VII to permit claims based on facially neutral employee classifications without a showing of intentional discrimination. *Id.* at 432 ("[L]ack of discriminatory intent is suggested by special efforts to help the undereducated employees, . . . [b]ut Congress directed the thrust of [Title VII] to the *consequences* of employment practices, not simply to motivation."); *see also Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977) (impliedly permitting claims based on gender-neutral employee classifications without a showing of intentional discrimination). Congress expanded Title VII to include states in 1972 *after* this Court interpreted the statute to include disparate impact claims in *Griggs*.[27] Taken together, the 1972 amendments and the *Griggs* decision create a cause of action

27. Courts presume that Congress is aware of and intends to adopt prevailing judicial interpretations of a statute that is reenacted without change. *See, e.g., Lorillard v. Pons*, 434 U.S. 575, 580 (1978).

against states based on gender-neutral classifications without requiring any showing of intent to discriminate. This Court's Eleventh Amendment and Fourteenth Amendment jurisprudence since *Seminole Tribe* and *City of Boerne*, however, makes clear that such causes of action do not meet the established constitutional standard under Section 1 of the Fourteenth Amendment. For this reason, a statute enabling a plaintiff to sustain such a gender-based claim against a state is not "appropriate legislation" to enforce the Fourteenth Amendment.

Indeed, this Court recently cited the disparate impact/ disparate treatment distinction as significant evidence of incongruity. *See Garrett*, 531 U.S. at 370. There this Court examined the ADA and found that it created disparate impact claims against states "without regard to whether such conduct has a rational basis." *Id.* While "disparate impact may be relevant evidence of racial discrimination, . . . such evidence alone is insufficient even where the Fourteenth Amendment subjects state action to strict scrutiny." *Id.* (citing *Washington v. Davis*, 426 U.S. 229, 239 (1976)). The standard of review most amenable to a statutory disparate impact remedy is the strict scrutiny standard. *See id.* Yet even in that context, *Garrett*'s discussion of *Davis* exposes the incongruence between the *Griggs* disparate impact standard of statutory liability and the Fourteenth Amendment standard. Any state action scrutinized less closely, including sex discrimination (which is subject to intermediate scrutiny), exhibits at least as much incongruence with a disparate impact remedy. *Cf. Feeney*, 442 U.S. at 274.

Title VII is incongruent even with respect to claims of intentional discrimination. In a "mixed motive" case, for example, the alleged impermissible motive actually must have caused the deprivation in order to make out a constitutional violation. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 248-49 (1989) (establishing standard based on

constitutional cases). However, under 42 U.S.C. § 2000e-2(m), Congress made states liable for injunctive relief, declaratory relief, and attorney fees, even when states do not violate the Constitution — e.g., when states can show that discipline of an employee was based substantially on a legitimate governmental interest, not the employee's sex. This incongruity may arise in virtually every adverse treatment case. *See* H.R. Rep. No. 102-40(I), 1, 47 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 585 (noting that the Justice Department argued that "virtually every Title VII disparate treatment case" involves mixed motives).

Title VII also is incongruent with the Fourteenth Amendment in adverse treatment cases because the Title VII exception for a bona fide occupational qualification ("BFOQ") is too limited and effectively alters the constitutional standard of scrutiny. This Court has interpreted the BFOQ exception to apply only in very narrow circumstances, and the limitation on that exception effectively pushes the standard of review of gender classifications from intermediate to strict scrutiny.[28] The intermediate scrutiny standard specifies that gender discrimination violates equal protection unless it advances "important governmental objectives" and the discriminatory means are "substantially related" to those objectives. *See Morrison*, 529 U.S. at 620. In contrast, the BFOQ exception in Title VII states that an employer may discriminate based on "religion, sex, or national origin in

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28. Indeed, the Seventh Circuit equated the stringency of the BFOQ exception to the stringency of the strict scrutiny standard of review. *See Int'l Union v. Johnson Controls, Inc.*, 886 F.2d 871, 899 (7th Cir. 1989) (equating the BFOQ standard to the strict scrutiny standard used in the First Amendment context), *rev'd on other grounds*, 499 U.S. 187 (1991). In reversing, this Court held, in essence, that the BFOQ standard is even more stringent than the Seventh Circuit's interpretation, thus making the Title VII standard more difficult to meet than strict scrutiny. *See Johnson Controls*, 499 U.S. at 201.

those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1) (2000).

This Court has consistently interpreted this exception to apply only in narrow circumstances. *See Johnson Controls*, 499 U.S. at 201 ("The BFOQ defense is written narrowly and this Court has read it narrowly."). In applying the BFOQ exception, this Court has interpreted "occupational qualification" in sex discrimination cases to exclude safety precautions aimed at protecting the employee,[29] and to permit gender-based safety precautions only where they protect the employees' ability to perform their job. *See id.* at 204. The intermediate scrutiny standard would certainly include employee safety as an important governmental objective, and therefore meet the applicable constitutional standard.[30] Under the Title VII BFOQ exception, however, employee safety does not meet the applicable standard. Thus, for sex discrimination claims, Title VII provides remedies against the states that are incongruent with the Fourteenth Amendment.

In the opinion below, the Eighth Circuit failed to perform any analysis of whether Title VII sex discrimination claims meet the congruence and proportionality test established in *Seminole Tribe, Boerne, Kimel,* and *Garrett*. Rather, the Eighth Circuit relied, with little additional discussion, on its own previous holding in *Okruhlik v. University of Arkansas*,

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29. *See Dothard*, 433 U.S. at 335.

30. *Cf. Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 470 (1981) (holding that statutory rape law protecting only underage females and creating liability only for males met the intermediate scrutiny standard because the purpose of the law was preventing teen pregnancy).

255 F.3d 615 (8th Cir. 2001), and concluded that "Title VII sex-discrimination claims against state employers are not barred by the Eleventh Amendment." *Maitland*, 260 F.3d at 964.

In *Okruhlik*, the court of appeals asserted that all Title VII intentional discrimination claims are congruent with the constitutional standard, but it completely overlooked the pervasive *Price Waterhouse* incongruity, as well as the BFOQ incongruity. 255 F.3d. at 626. With regard to adverse impact claims, the court relied on *In re Employment Discrimination against State of Alabama*, 198 F.3d 1305, 1321-24 (11th Cir. 1999). The Eighth Circuit's application of *In re Alabama*, however, is incompatible with this Court's analysis of disparate impact remedies for unconstitutional sex discrimination. *Compare Feeney*, 442 U.S. at 274, *Davis*, 426 U.S. at 239, *with Garrett*, 531 U.S. at 370.

In *Okruhlik*, the Eighth Circuit also examined Congress's 1972 findings of discrimination against women and concluded they were sufficient to make Title VII remedial, at least as to women. *See* 255 F.3d at 625. The *Maitland* court did not establish, however, that such findings support abrogation in all Title VII sex discrimination cases. It is one thing to say that a generalized absence of a pattern of unconstitutional conduct justifies overturning an entire statute. *See Kimel*, 528 U.S. at 91; *City of Boerne*, 521 U.S. at 532; *Maitland*, 260 F.3d at 965 n.5. It is altogether a different proposition to assert that evidence of a partial pattern supports a generalized remedy. Only two Terms ago, this Court addressed that very question, and did so in a case involving deprivation of rights on the basis of sex. *Morrison*, 529 U.S. at 625-26. This Court found Congress had exceeded its Section 5 powers, in part because it had extended the remedy to the entire nation, when the evidence showed only a partial pattern in some states. *Id.* at 626-27. As *Morrison*

shows, where the record demonstrates only a partial pattern, the congruence and proportionality test requires only a partial remedy, carefully delimited to address that pattern. *Id.* Where the remedy is not thus limited, under *Morrison*, the entire statute is invalid.

In the alternative, the writ should be granted because there is no basis for abrogation for sex discrimination claims brought by men. Congress had no pattern of state discrimination against men before it, and in the absence of such a pattern, retroactive relief is not allowed. *Garrett*, 531 U.S. at 374 n.9.

Congress must "carefully delimit" its remedies so that they are proportional and congruent to their corresponding constitutional violations. To allow abrogation of the states' sovereign immunity without a record of systematic sex discrimination, especially against men, is to ignore this Court's Eleventh and Fourteenth Amendment jurisprudence. The Eighth Circuit has purported to take that step.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED AND FILED AUGUST 15, 2001

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 00-2192

Ian Maitland,

Appellee,

v.

University of Minnesota; Regents of the University of Minnesota; Wendell R. Anderson; M. Elizabeth Craig; Jean B. Keffeler; Elton A. Kuderer; H. Bryan Neel, III; Mary J. Page; Lawrence Perlman; Thomas R. Reagan; David K. Roe; Darrin M. Rosha; Stanley D. Sahlstrom; Ann J. Wynia; Julie Bleyhl; William E. Hogan, II; Hyon T. Kim; William R. Peterson; Nils Hasselmo, University of Minnesota President,

Appellants.

Submitted: June 15, 2001
Filed: August 15, 2001

Before WOLLMAN, Chief Judge, MAGILL, and BOWMAN, Circuit Judges.

Appendix A

BOWMAN, Circuit Judge.

This case is making its third appearance in this Court, having been twice dismissed and revived on appeal. In this latest interlocutory appeal, the University of Minnesota (the "University"), the members of the Board of Regents, and the President of the University (the "individual defendants"), appeal the District Court's[1] denial of the defendants' motion to dismiss or, in the alternative, for partial summary judgment based on Eleventh Amendment immunity and absolute legislative immunity. We affirm.

I.

The origins of this case go back to 1973, when female faculty members brought a class action suit against the University of Minnesota alleging sexual discrimination in compensation. In 1980, the University settled with the class by entering into a consent decree. *Rajender v. Univ. of Minn.*, 563 F. Supp. 401, (D. Minn. 1983) (*Rajender I*), *rev'd in part and vacated in part*, 730 F.2d 1110 (8th Cir. 1984). In 1983, several female faculty members filed petitions under the consent decree that alleged continuing discrimination in compensation by the University. The court again certified the female faculty members as a class and, in 1989, settled the matter with a second consent decree. *In re Rajender Salary Settlement*, Civ. No. 3-89-464 (D. Minn. Oct. 12, 1989) (*Rajender II*). *Rajender II* provided for an adjustment whereby $3 million would be distributed to female faculty members in the form of salary increases.

1. The Honorable Donovan W. Frank, United States District Judge for the District of Minnesota.

Appendix A

Ian Maitland, a male professor at the University of Minnesota, sued the University and other officials in 1993 under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e to 2000e-17 (1994 & Supp. IV 1998), claiming that the *Rajender II* salary increases for female faculty members had created a discriminatory pay structure tilted against himself and other male faculty members. The District Court granted summary judgment to the University after concluding that Maitland's claims were barred by the Civil Rights Act of 1991 and under principles of estoppel. *Maitland v. Univ. of Minn.*, Civ. No. 3-93-91 (D. Minn. July 12, 1993). We reversed the District Court on both grounds. *Maitland v. Univ. of Minn.*, 43 F.3d 357 (8th Cir. 1994) (*Maitland I*).

On remand, Maitland asserted an additional claim for damages under section 102(a) of the Civil Rights Act of 1991, 42 U.S.C. § 1981a (1994), and reasserted a 42 U.S.C. § 1983 claim (which had previously been dismissed) that alleged the University had violated his equal protection rights. In 1996, the District Court granted summary judgment to the University, finding that Maitland was ineligible to recover under his section 102(a) damages claim, that the individual defendants were entitled to qualified immunity, and that the University and the individual defendants were entitled to judgment as a matter of law on the remaining claims. *Maitland v. Univ. of Minn.*, Civ. No. 4-93-25 (D. Minn. Dec. 6, 1996). Again, we reversed. *See Maitland v. Univ. of Minn.*, 155 F.3d 1013, 1019 (8th Cir. 1998) (*Maitland II*).[2]

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2. For a more detailed account of the litigation through *Maitland II*, see *Maitland v. Univ. of Minn.*, 43 F.3d 357 (8th Cir. 1994) (*Maitland I*) and *Maitland v. Univ. of Minn.*, 155 F.3d 1013 (8th Cir. 1998) (*Maitland II*).

On remand, the University filed a motion to dismiss or, in the alternative, for partial summary judgment on four different grounds. First, the individual defendants argued that they had absolute legislative immunity when they approved the *Rajender II* settlement, thereby barring Maitland's § 1983 claim against them. Second, the defendants argued that Congress exceeded its constitutional authority under Section 5 of the Fourteenth Amendment when it abrogated the University's Eleventh Amendment immunity with respect to Title VII sex-discrimination claims brought by men. Third, the defendants argued that recent changes to Maitland's salary have rendered his back-pay and injunctive-relief claims moot. Finally, the defendants argued that Maitland failed to join indispensable parties, i.e., members of the *Rajender II* class from whom the defendants contended Maitland was seeking divestiture relief. The District Court[3] denied the motion on all four grounds. *Maitland v. Univ. of Minn.*, Civ. No. 4-93-25 (D. Minn. Mar. 29, 2000). The defendants bring this interlocutory appeal challenging the District Court's rulings on the legislative-immunity and Eleventh Amendment issues.

II.

We have jurisdiction over this interlocutory appeal under the collateral-order doctrine. *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-47 (1949); *see, e.g., Powell v. Ridge*, 247 F.3d 520, 524 (3d Cir. 2001) ("[O]rders denying legislative immunity have often been reviewed under the collateral order doctrine."), *petition for cert. filed*, 69 U.S.L.W. 3791 (U.S. June 12, 2001) (No. 00-1854); *Murphy*

3. The case was assigned to Judge Frank for the first time after our remand in *Maitland II*.

v. Ark., 127 F.3d 750, 753-54 (8th Cir. 1997) (noting that an order denying a claim of Eleventh Amendment immunity is properly appealable as a collateral order). We review de novo a district court's disposition of a motion to dismiss. *Hafley v. Lohman*, 90 F.3d 264, 266 (8th Cir. 1996), *cert. denied*, 519 U.S. 1149 (1997).

A.

The defendants first argue that the District Court erred by denying the individual defendants legislative immunity from Maitland's § 1983 claim against them in their individual capacities. Maitland based his claim upon their approval of the *Rajender II* consent decree and the discrimination that Maitland claims he suffered as a result of the implementation of that decree. The individual defendants contend that they are immune from suit because the Regents were elected to their position by the Minnesota state legislature and were performing a legislative function when they entered into the consent decree.[4]

We conclude that the District Court properly denied the defendants' legislative-immunity claim on the basis of our decision in *Stanley v. Magrath*, 719 F.2d 279 (8th Cir. 1983). In *Stanley*, students at the University of Minnesota brought a § 1983 claim against members of the Board of Regents following the Regents' decision to permit students to obtain a refund of a compulsory fee used to support the University newspaper following an outcry over an especially

4. The President of the University is elected by the Regents and, in addition to other responsibilities, serves as President of the Board of Regents.

controversial issue of the newspaper. Students affiliated with the newspaper argued that the Regents' decision to refund monies based upon the content of the newspaper violated the First Amendment. We held, *inter alia*, that members of the Board of Regents were not entitled to legislative immunity:

> The Regents do not qualify as legislators within the meaning of the legislative-immunity doctrine. Although the Regents are given the power "to enact laws for the government of the university" they are essentially administrators who oversee the operation of a state educational institution. . . .
>
> There are instances in which the members of bodies other than state legislatures may have legislative immunity from suit under § 1983. The governing body of a state-supported institution of higher learning, we think, cannot qualify for such protection.

Id. at 284-85 (citations omitted). The defendants recognize our decision in *Stanley*, but argue that the Supreme Court's subsequent decision in *Bogan v. Scott-Harris*, 523 U.S. 44 (1998), suggests that *Stanley* was wrongly decided and they urge us to revisit the issue. We decline to do so.

In *Bogan*, the Supreme Court held that local legislators, like their federal, state and regional counterparts, were protected by absolute legislative immunity for their legislative activities. 523 U.S. at 46, 54. The Court went on to find that "[a]bsolute legislative immunity attaches to all

actions taken 'in the sphere of legitimate legislative activity,'" and that "[w]hether an act is legislative turns on the nature of the act." *Id.* at 54 (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)). We find, however, that *Bogan* fails to illuminate the issue here and does not require us to rethink our holding in *Stanley.* Because *Bogan* does not undercut *Stanley*, our well-established rule that "one panel [of this Court] is not at liberty to overrule a decision of another panel" governs and we are bound by our holding in *Stanley. United States v. Prior*, 107 F.3d 654, 660 (8th Cir.), *cert. denied*, 522 U.S. 824 (1997). Accordingly, the individual defendants are not immune from Maitland's § 1983 claim under the doctrine of legislative immunity.

B.

The defendants next argue that the District Court erred by denying Eleventh Amendment immunity to the University on Maitland's Title VII claim. Specifically, the defendants argue that Congress exceeded its constitutional authority under Section 5 of the Fourteenth Amendment when it abrogated the University's Eleventh Amendment immunity with respect to Title VII sex-discrimination claims brought by men. The defendants argue that there was no factual basis for Congress to subject the States to sex-discrimination claims by men, and that Title VII, as applied to men, is not a carefully delimited, proportional, and congruent remedy for unconstitutional conduct by the States.

The defendants first contend that the District Court erred by relying on *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), wherein the Supreme Court rejected an Eleventh Amendment

challenge to a Title VII sex-discrimination claim brought by male employees. The District Court, relying on *Fitzpatrick*, held that Maitland's Title VII claim was neither barred by the Eleventh Amendment nor beyond Congress's legislative power under Section 5 of the Fourteenth Amendment. *Maitland*, Civ. No. 4-93-25 at 8-9. The defendants argue that *Fitzpatrick* does not control because the question at issue here — whether Title VII sex-discrimination claims brought by males are beyond Congress's power under Section 5 of the Fourteenth Amendment — was never directly before the Court in *Fitzpatrick*. Rather, the defendants argue, the Court in *Fitzpatrick* treated the issue of whether Section 5 of the Fourteenth Amendment could constitutionally support a Title VII sex-discrimination claim brought by a male employee as an ancillary antecedent proposition that was assumed, but not decided, by the Court.

In *Fitzpatrick*, current and retired male employees of the State of Connecticut brought a Title VII claim against the State, arguing that the State's retirement benefit program discriminated against them because of their sex. The district court held that the program violated Title VII and granted injunctive relief, but held that retrospective retirement benefits and attorney fees were prohibited under *Edelman v. Jordan*, 415 U.S. 651 (1974). The Second Circuit upheld the district court with respect to the retrospective retirement benefits, but reversed as to attorney fees. The Supreme Court granted certiorari to resolve "whether, as against the shield of sovereign immunity afforded the State by the Eleventh Amendment, Congress has the power to authorize federal courts to enter such a [monetary] award against the State as a means of enforcing the substantive guarantees of the

Fourteenth Amendment." *Fitzpatrick*, 427 U.S. at 448 (citation omitted). The Court ultimately concluded that the State's Eleventh Amendment immunity was abrogated by Title VII, which was enacted under Section 5 of the Fourteenth Amendment, and that the male employees were permitted to recover their retrospective retirement benefits from the State. *See id.* at 456.

The defendants rely heavily on footnote eleven of *Fitzpatrick*, where the Court states that "[a]part from their claim that the Eleventh Amendment bars enforcement of the remedy established by Title VII in this case, respondent state officials do not contend that the substantive provisions of Title VII as applied here are not a proper exercise of congressional authority under § 5 of the Fourteenth Amendment." 427 U.S. at 456 n.11. The defendants urge us to interpret this footnote to mean that the Court assumed, but did not answer, the issue of whether Congress created Title VII claims for men consistent with Section 5 of the Fourteenth Amendment. We agree with the defendants that *Fitzpatrick* did not squarely decide the issue, but we believe that *Fitzpatrick* is highly persuasive authority for the proposition that Title VII sex-discrimination claims brought in federal court by male employees against a state are not barred by the Eleventh Amendment. *Cf. Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998) (permitting male employee to sue employer for discrimination under Title VII); *Newport News Shipbldg. & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682 (1983) (finding that, under Title VII, "[m]ale as well as female employees are protected against discrimination").

The defendants argue that, because *Fitzpatrick* is not controlling, Maitland's Title VII claim is unconstitutional under the more recent test for challenges to legislation enacted under Section 5 of the Fourteenth Amendment. Specifically, the defendants contend that Congress failed to identify a history and pattern of unconstitutional employment discrimination by the State against men when it enacted and amended Title VII, and that the rights and remedies created by Title VII are not "congruent and proportional" to that pattern of discrimination. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 121 S. Ct. 955, 964, 966 (2001); *see also City of Boerne v. Flores*, 521 U.S. 507, 520 (1997). Accordingly, the defendants argue, Title VII claims brought by men do not abrogate the State's Eleventh Amendment immunity.

We recently held in *Okruhlik v. United States*, Nos. 00-3159, 00-3460, 00-3896, 2001 WL 686995 (8th Cir. June 20, 2001), that Title VII sex-discrimination claims against state employers are not barred by the Eleventh Amendment. *Okruhlik* was the result of a consolidation of three separate interlocutory appeals that raised the same issue — whether professors and staff at the University of Arkansas may maintain claims against University of Arkansas trustees and other state officials for sex and race discrimination and harassment under Title VII. We held that Congress's enactment of, and amendments to, Title VII validly abrogated the States' Eleventh Amendment immunity. Most importantly for our purposes here, we held that in enacting and amending Title VII, "Congress expressed its unequivocal intent to abrogate immunity and acted pursuant to its constitutional authority" under Section 5 of the Fourteenth Amendment. *Id.* at *7.

Appendix A

Inasmuch as Title VII does not differentiate between men and women, *see* 42 U.S.C. § 2000e-2(a) (1994) (prohibiting discrimination "against any individual . . . because of . . . sex"), we believe our holding in *Okruhlik* that Title VII was enacted and amended in accord with the strictures of Section 5 must apply equally to men as it does to women. We therefore disagree with the defendants' contention that, although Title VII removes the bar of Eleventh Amendment immunity to federal court sex-discrimination actions by women, the Constitution requires a parsing of the legislative findings or review of the "proportionality and congruity" of remedies to determine whether the Eleventh Amendment bar also has been removed with respect to Title VII actions by men.[5]

---

5. The Supreme Court has generally disallowed remedial legislation founded in Congress's power under Section 5 of the Fourteenth Amendment in instances where Congress failed to establish and identify the *general* problem that the legislation was intended to ameliorate. For example, the Supreme Court held that the Religious Freedom Restoration Act in *City of Boerne v. Flores*, 521 U.S. 507, 530-32 (1997), was an unconstitutional exercise of Congress's power under Section 5 because of the paucity of evidence suggesting a widespread pattern of religious discrimination and the disproportionality of the Act to its remedial objective. Likewise, the Supreme Court in *Kimel v. Florida Board of Regents*, 528 U.S. 62, 83-86 (2000), found the Age Discrimination in Employment Act beyond Congress's power under Section 5 because of a lack of evidence of age discrimination generally and the disproportionality of the remedies under the Act. Under the defendants' reasoning, if a non-African-American minority employee brought a race-discrimination claim against his state employer under Title VII, and the legislative history of Title VII was devoid of any findings specific to that employee's minority group, the legislation would not abrogate

(Cont'd)

Appendix A

III.

The rulings of the District Court challenged in this interlocutory appeal are affirmed and the case is remanded for further proceedings.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

(Cont'd)
the state's Eleventh Amendment immunity and the employee would be without recourse under Title VII. *Cf. McDonald v. Santa Fe Transp. Co.*, 427 U.S. 273, 278-85 (1976) (holding that white employees may properly maintain race-discrimination claims under Title VII). Even putting the rather obvious Equal Protection Clause problems to one side, we do not think that the defendants' reasoning affords us a proper approach towards application of the Eleventh Amendment.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA DATED AND FILED MARCH 29, 2000

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Civil No. 4-93-25 (DWF/AJB)

Ian Maitland,

Plaintiff,

v.

The University of Minnesota and the Regents of the University of Minnesota; Wendell R. Anderson; M. Elizabeth Craig; Jean B. Keffeler; Elton A. Kuderer; H. Bryan Neel III; Mary J. Page; Lawrence Perlman; Thomas R. Reagan; David K. Roe; Darrin M. Rosha; Stanley D. Sahlstrom; Ann J. Wynia; Julie A. Bleyhl; William E. Hogan II; Hyon T. Kim; William R. Peterson; and the University of Minnesota President Nils Hasselmo,

Defendants.

MEMORANDUM OPINION AND ORDER

* * *

Introduction

The above-entitled matter came on for hearing before the undersigned United States District Judge on December

17, 1999, pursuant to Defendants' Motion to Dismiss or, in the alternative, for Partial Summary Judgment and Plaintiff's Motion for Class Certification. The matter came on for additional hearing regarding Defendants' Motion to Dismiss on February 25, 2000. In the Complaint, Plaintiff alleges discrimination in compensation based upon sex. For the reasons set forth below, Defendants' motion is denied and Plaintiff's motion is denied.

Background

The motions presently before the Court are merely the latest volleys in what amounts to an all-out war between the University of Minnesota and some of its faculty regarding gender equity. In 1973, a class of female faculty brought a class action gender discrimination lawsuit (the "*Rajender* action") against the University, alleging, *inter alia*, discrimination in compensation. *See Rajender v. University of Minnesota*, 563 F. Supp. 401, 402-03 (D. Minn. 1983) ("*Rajender I*") (discussing the history of the *Rajender* litigation). In 1980, the University entered into a consent decree to settle that litigation.

In 1983, several female faculty filed petitions under the *Rajender* consent decree asserting continued discrimination in salary. The court certified the complaint as a class action, and the matter was eventually settled in 1989 through a second consent decree. *See In re Rajender Salary Settlement*, Civ. No. 3-89-464 (D. Minn. Oct. 12, 1989) ("*Rajender II*").

Plaintiff Ian Maitland is a professor at the University of Minnesota and was a professor there at the time of the second *Rajender* litigation. Maitland was not a party to that litigation,

nor was he formally notified of the proposed settlement prior to its approval. However, "[i]n its order approving the settlement, the court specifically noted that it had 'received, reviewed, and considered' a letter and additional written comments from Maitland and also had considered the comments he made at his personal appearance before the court." *Maitland v. University of Minnesota*, 43 F.3d 357, 360 (8th Cir. 1994) (citations omitted) ("*Maitland I*").

Under the terms of the second *Rajender* consent decree, the University undertook a two-year salary adjustment process beginning in February of 1990. "The increases were calculated according to a formula specified in the consent decree, and each beneficiary received an increase in salary whether her current salary was lower or higher than the salaries of similarly situated males." *Id.*

In July of 1990, Maitland filed a complaint with the Equal Employment Opportunity Commission (EEOC), alleging that, through implementation of the salary equity process, the University was discriminating against him on the basis of his gender. The EEOC issued a right to sue letter on October 15, 1992, and Maitland filed this action, asserting claims under Title VII, on January 11, 1993.

On July 23, 1993, the District Court entered summary judgment in favor of the University, finding that Maitland's claims were barred by the provisions of the Civil Rights Act of 1991 or by general principles of estoppel. *See Maitland v. University of Minnesota*, Civ. No. 3-93-91 (D. Minn. July 12, 1993). The Eighth Circuit reversed the District Court's grant of summary judgment, holding that the Civil Rights Act of 1991 could not be applied retroactively to Maitland's

suit and that "general principles of estoppel" did not bar his cause of action. *Maitland I*, 43 F.3d 357.

On remand, Maitland asserted an additional claim for damages under § 102(a) of the Civil Rights Act of 1991, 42 U.S.C. § 1981a (1994), and reasserted a previously dismissed claim under 42 U.S.C. § 1983 for violation of his equal protection rights. On December 6, 1996, the District Court again granted summary judgment in favor of the University, finding that Maitland was ineligible to recover the damages requested under § 102(a) of the Civil Rights Act of 1991; that the individual Defendants were entitled to qualified immunity; and that the University and other Defendants were entitled to judgment as a matter of law on all remaining claims. *Maitland v. University of Minnesota*, Civil No. 4-93-25 (D. Minn. Dec. 6, 1996). The Eighth Circuit again reversed the District Court in *Maitland v. University of Minnesota*, 155 F.3d 1013 (8th Cir. 1998) ("*Maitland II*").

On March 24, 1999, this Court granted Maitland leave to amend his Complaint to allege a class. Maitland's motion to certify that class is currently before the Court.

The University has brought a motion to dismiss or, in the alternative, for partial summary judgment on several different grounds. First, the University argues that the Supreme Court's decision in *Bogan v. Scott-Harris*, 523 U.S. 44 (1998), extends absolute legislative immunity to the individual Defendants with the performance of the "quintessential legislative function" of approving the *Rajender* settlement and therefore precludes Maitland's § 1983 claims against them. Second, the University claims

that, in light of the Supreme Court's decision in *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631 (2000), the Court must find that Congress exceeded the scope of its authority under § 5 of the Fourteenth Amendment to the extent that it has abrogated states' Eleventh Amendment immunity with respect to gender discrimination suits by men; in other words, the University argues that Title VII gender claims cannot be brought against state agencies by men. Third, the University argues that recent adjustments to Maitland's salary render moot his claims for back pay and eliminate his standing to sue for injunctive relief.[1] Finally, the University argues that Maitland has failed to join indispensable parties, specifically the members of the *Rajender II* class from whom Maitland allegedly seeks divestiture relief.

Discussion

1. Standard of Review

The University's motion to dismiss raises several challenges to this Court's subject matter jurisdiction over the dispute at hand. Fed. R. Civ. P. 12(b)(1). In determining the existence of subject matter jurisdiction, the Court may consider affidavits, exhibits, and other evidence outside the four corners of the pleadings. *See Osborn v. United States*,

1. The University also argues that, in the absence of any continuing salary disparity, Maitland lacks standing to sue based upon his "general disagreement" with the *Rajender* settlements. Because, as noted below, the Court finds that the recent adjustments to Maitland's salary do not impinge upon his standing to challenge the settlements, the Court need not address whether Maitland could maintain a suit based solely upon some general philosophical or technical disagreement with the settlements.

918 F.2d 724, 728 (8th Cir. 1990). The Court may make factual determinations to the extent that such determinations are necessary to establish the existence of subject matter jurisdiction. *Id.* at 729. The party asserting jurisdiction carries the burden of demonstrating the existence of subject matter jurisdiction. *Id.*

2. Eleventh Amendment Immunity

In the recent decision of *Kimel v. Florida Board of Regents*, 120 S. Ct. 631 (2000), the U.S. Supreme Court held that Congress exceeded the scope of its authority under Section 5 of the Fourteenth Amendment when it expressly abrogated the states' Eleventh Amendment immunity from suit with respect to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623(a)(1). The Court relied upon the "congruence and proportionality" test as articulated in *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997): "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." The test requires that the Court consider, first, the constitutional harm which the legislation seeks to remedy and, second, whether the scope of the legislation designed to remedy that harm is appropriate in light thereof.[2]

---

2. The United States Supreme Court has employed the "congruence and proportionality" test three times and each time has found that Congress exceeded the scope of its Section 5 authority. *See Kimel v. Florida Board of Regents*, 120 S. Ct. 631 (2000) (the Age Discrimination in Employment Act); *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999) (the Patent Remedy Act); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (the Religious Freedom Restoration Act).

Appendix B

In determining that Congress could not abrogate states' Eleventh Amendment immunity with respect to the ADEA, the Supreme Court noted that, within the context of constitutional jurisprudence, classification on the basis of age is subject only to rational basis scrutiny. The ADEA, in contrast, generally precludes classification based on age for purposes of employment decisions. As a result, the Supreme Court determined that "[j]udged against the backdrop of [ ] equal protection jurisprudence, it is clear that the ADEA is 'so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent unconstitutional behavior.'" *Kimel*, 120 S. Ct. at 646 (quoting *City of Boerne*, 521 U.S. at 532).

The Supreme Court went on to note that, in spite of the broad scope of the behavior prohibited by the ADEA, the ADEA might nevertheless be a valid remedial measure, within the purview of Congress' Section 5 authority. Specifically, the Supreme Court stated that "'[t]he appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.'" *Id.* at 648 (quoting *City of Boerne*, 521 U.S. at 530). To determine whether an Act of Congress is such a legitimate remedial measure, the Court may consider whether the legislative history of the Act identifies a significant pattern of unconstitutional discrimination sufficient to warrant sweeping remedial measures.[3]

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3. The University seems to argue that the Court is limited to considering the legislative history of the Act to determine whether such a significant pattern of unconstitutional discrimination exists. (Cont'd)

Appendix B

The University argues that, under the congruence and proportionality test, applying Title VII to the states (at least with respect to actions brought by men) transcends Congress' authority under Section 5. Specifically, the University notes that Congress included the prohibition on gender discrimination in Title VII as something less than an afterthought, actually as an attempt to scuttle the legislation. Congress did not identify any significant pattern of gender discrimination in employment — much less employment in the public sector — which would justify an abrogation of states' Eleventh Amendment immunity. The Court notes, however, that the Court is not limited to the legislative history of Title VII in determining whether the harm which Title VII addresses is sufficiently grave as to warrant the sweeping remedy which Title VII presents.

In *Hundertmark v. State of Florida Department of Transportation*, __ F.3d __, 2000 WL 253593 (11th Cir. 2000), the Eleventh Circuit applied the congruence and proportionality test to the Equal Pay Act of 1963, 29 U.S.C. § 206(d) ("EPA"). In so doing, the court took notice of the fact that "gender discrimination is a problem of national import," and cited numerous sources outside of the legislative history of the EPA including President Clinton's Year 2000 State of the Union Address and reports by the U.S. Bureau of the Census.

(Cont'd)

The Court does not read *Kimel* as requiring such a limited inquiry. Indeed, as discussed at greater length below, in *Hundertmark v. State of Florida Department of Transportation*, __ F.3d __, 2000 WL 253593 (11th Cir. 2000), the Eleventh Circuit went far outside the legislative record to determine that the Equal Pay Act was intended to remedy an injury of significant import.

Id. at *4. This Court notes that the Eleventh Circuit's analysis is equally applicable to Title VII's gender discrimination provisions. Indeed, the Eleventh Circuit's analysis of the EPA would appear to be directly on point with the analysis this Court must make of Title VII; to the extent that the Eleventh Circuit found a valid abrogation of Eleventh Amendment immunity in the context of the EPA, this Court finds a valid abrogation of Eleventh Amendment immunity in the context of Title VII.

The University's claim, however, is somewhat more complicated than that presented in *Hundertmark*. Specifically, this particular case involves a suit by a male faculty member for gender discrimination. While the "public record" is sufficiently clear that there is an historical pattern of employment discrimination against women, even within the public sector, there is no such similar record with respect to gender discrimination against men. Thus the Court is faced with the question of whether *Kimel* and its predecessors require the Court to consider the validity of abrogation of Eleventh Amendment immunity with respect to specific subclasses of potential litigants.

Given the restrictive approach to Section 5 authority taken by the Supreme Court in the recent past, it seems to be within the realm of possibility that a higher court would take that step and find that Mr. Maitland is barred by the Eleventh Amendment from suing a state entity. However, this Court is not willing to take that step. As the Plaintiff notes, the U.S. Supreme Court has previously held that an action by men against a state under Title VII does not run afoul of the Eleventh Amendment. *Fitzpatrick v. Bitzer*, 427 U.S. 445

(1976). While it is true that the *Fitzpatrick* Court did not apply the congruence and proportionality test, and it would appear that the Court has become less amenable to abrogation of Eleventh Amendment immunity in the intervening years, *Fitzpatrick* has not been explicitly overruled. Accordingly, this Court finds that it is bound by *Fitzpatrick* and that the Eleventh Amendment does not preclude Mr. Maitland's claims.

3. Absolute Legislative Immunity

Maitland has sued the members of the Board of Regents and the president of the University (the "individual Defendants") in their individual capacity for their entry into the *Rajender* settlement. The individual Defendants argue that the U.S. Supreme Court's decision in *Bogan v. Scott-Harris*, 523 U.S. 44, 118 S. Ct. 966 (1998), requires this Court to find that Maitland's suit against them is barred by the doctrine of absolute legislative immunity. Such a finding would fly directly in the face of existing Eighth Circuit precedent to the effect that the president and regents of the University of Minnesota are not entitled to legislative immunity. *Stanley v. Magrath*, 719 F.2d 279 (8th Cir. 1983).

The *Bogan* decision, on which the individual Defendants rely, extended the doctrine of absolute legislative immunity to local legislators. In so holding, the Supreme Court stated that, "[r]egardless of the level of government, the exercise of legislative discretion should not be inhibited by judicial interference or distorted by the fear of personal liability." 118 S. Ct. at 971 (citations omitted). The Court noted, however that its decision did not change existing law with

respect to legislative immunity, but merely made explicit that earlier cases had held implicitly with respect to local legislative bodies. Indeed, the Supreme Court specifically found that the *Bogan* decision was a natural extension of the Supreme Court's ruling in *Lake Country Estates v. Tahoe Planning Agency*, 440 U.S. 391 (1979) (extending doctrine of legislative immunity to regional planning authority).

In *Stanley*, the Eighth Circuit similarly cited to *Lake Country Estates* for the proposition that bodies other that state legislatures could be protected by the doctrine of absolute immunity. The Eighth Circuit nevertheless declined to extend the doctrine of legislative immunity to the president and regents of the University of Minnesota. Given that *Bogan* does not change the standard for assessing legislative immunity, this Court is bound by the Eighth Circuit decision in *Stanley*, and thus finds that the individual Defendants are not shielded from suit by the doctrine of absolute legislative immunity.

4. The *Rajender II* Class

The University's argument here is somewhat unusual. The University asserts that it is unclear whether Maitland is seeking divestiture relief against the *Rajender* class but that, if he is, such a claim should be dismissed for failure to join the *Rajender* class as a necessary party. Maitland's response indicates that no such divestiture relief is being sought (indeed, Maitland contends that no such divestiture relief is available under existing law). Thus, the Court is faced with an almost unprecedented agreement by the parties. Because the University's concern is a non-issue, the Court denies the

motion to dismiss on this basis with the understanding that the relief challenged by the University is not being sought by Maitland.

5. The Effects of Recent Adjustments to Maitland's Salary

The University argues that salary adjustments made between the date of the *Rajender* salary equity process (the 1989-1990 academic year) and the present have eliminated any discrepancy between what Maitland's compensation is and what it would have been absent the *Rajender* settlements. Accordingly, the University asserts that Maitland is stripped of standing to challenge the *Rajender* settlements because he is unable to demonstrate a "distinct and palpable harm" as a result of those settlements.

Without delving too deeply into the factual record before the Court, it is sufficient to say that the record creates a genuine issue of material fact with respect to whether Maitland's total compensation since the *Rajender* settlements is equivalent to what his total compensation would have been without those settlements. In other words, Maitland has made a claim of direct and palpable harm, one which could be sustained by the factual record before the Court. Although the Court may make factual determinations on a motion to dismiss for lack of subject matter jurisdiction (here premised upon a lack of justiciability), the very heart of this litigation is whether and to what extent Maitland was disadvantaged by the *Rajender* settlements. The University apparently requests that the Court resolve the central factual dispute of the litigation in order to establish subject matter jurisdiction. The Court will not take that leap. In every case for equal pay, an

ultimate factual determination that the plaintiff was not truly discriminated against could be construed as a lack of standing to bring the claim in the first place. Maitland has asserted a claim for gender discrimination, has offered evidence to support such a finding, and has offered evidence that no intervening act by the University has remedied his harm. Accordingly, the Court finds that Maitland does have standing to assert his claims and that such claims are not moot.

6. Maitland's Motion for Class Certification

Maitland has moved the Court to certify a proposed class of plaintiffs, defined as all male academic employees of the University of Minnesota who fit the definition of the female settlement class in the 1989 *Rajender II* Settlement Agreement and Consent Decree, but for the fact that they are male. Maitland asserts that certification of the class is appropriate because the class satisfies the requirements of Rules 23(a), 23(b)(2), and 23(b)(3) of the Federal Rules of Civil Procedure. Defendants argue that the motion for class certification is untimely, that Maitland is not an adequate representative for the proposed class, that Maitland is not typical of the class he purports to represent, that the requirements for Rule 23(b)(2) are not met because Maitland's claim is not "primarily" for injunctive relief, and that Rule 23(b)(3) is not satisfied because common questions of law and fact do not predominate.

With respect to Defendants' claim that this motion for class certification is untimely, the Court agrees with Maitland that the law of the case requires a different conclusion. In an Order dated March 24, 1999, Magistrate Judge Boylan

granted Maitland's motion for leave to amend his Complaint to assert class allegations. In so doing, Magistrate Judge Boylan noted that the apparent delay in bringing such a motion was the result of the unique procedural circumstances of this case. The Magistrate Judge went on to note that the Defendants were on notice of Maitland's intent to assert class allegations from the outset of the litigation and that the Defendants were not prejudiced by the delay.

Rule 23(a) of the Federal Rules of Civil Procedure defines the threshold requirements for certifying a class: (1) the class is so numerous that joinder of all members is impracticable; (2) there are common questions of law or fact common to the class; (3) the claims of the representative parties are typical of the claims of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Again, the Court disagrees with the Defendants in their contentions that Maitland's claims are atypical of the purported class and that Maitland will not adequately represent the class. The factual predicate for Maitland's claims are common to the potential claims of the purported class. Moreover, while Maitland may have suffered some difficulty in obtaining counsel to represent the purported class, he himself has represented the interests of the purported class with dogged determination and remarkable success.

The Court does agree with the Defendants with respect to Maitland's inability to satisfy the requirements of Rule 23(b). First, with respect to Rule 23(b)(2), the Court finds that, however motivated by principle Maitland may be, claims for equitable or injunctive relief do not predominate

over the claims for damages. Ultimately, this case turns on the distribution of $3 million in earmarked funds during the 1989-1990 academic year and the "ripples" of that salary adjustment through the subsequent years. While Maitland makes claims for injunctive and equitable relief which are important to the just resolution of the case, those claims do not predominate over the claims for monetary damages. Second, with respect to Rule 23(b)(3), the Court concludes that "a class action is [not] superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). Among the factors that the Court can and should consider in determining satisfaction of Rule 23(b)(3) requirements is "the extent and nature of any litigation concerning the controversy already commenced by or against members of the class." The initial allegedly discriminatory action in this matter took place over 10 years ago. Despite Maitland's claim that a resolution of this action in his favor will result in a flood of copycat litigation, it is unclear how many members of the purported class retain the right to bring independent actions in light of the relevant statutes of limitations.

For the reasons stated, the Court determines that Maitland and the purported class satisfy the requirements for Rule 23(a) but not those of Rule 23(b). Accordingly, certification of the purported class is inappropriate.

7. Conclusion

The Court has little doubt that this Order will prompt yet another appeal and that there will, within a few months, be a *Maitland III*. Given the gravity and complexity of these

issues, the lengthy and convoluted procedural history of this case is perhaps understandable. However, the Court feels compelled to note that this litigation is an outward manifestation of what must be a significantly more deeply rooted problem: Minnesota's state university system appears to be plagued with distrust and even open hostility between its faculty and the system administration.[4] The continuing rift surely compromises the ability of the academic community to thrive, and, without question, undermines the public's faith in its institutions of higher learning. The Court urges the parties to reach some just and speedy resolution to this situation, so that this University and others in the system can move on with the business of contributing to the common knowledge and educating our next generation of citizens.

For the reasons stated, **IT IS HEREBY ORDERED**:

1. Plaintiff's Motion for Class Certification (Doc. No. 122) is **DENIED**.

2. Defendants' Motions to Dismiss or, in the alternative, for Partial Summary Judgment (Doc. Nos. 133 and 146) are **DENIED**.

Dated: March 29, 2000

s/ Donovan W. Frank
DONOVAN W. FRANK
Judge of the United States
District Court

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4. The Court notes, further, that this action is one of several between faculty and Minnesota state universities regarding gender — and racial — partiality in the terms and conditions of employment.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DENYING PETITION FOR REHEARING DATED OCTOBER 5, 2001

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 00-2192

Ian Maitland,

Appellee,

vs.

University of Minnesota; Regents of the University of Minnesota; Wendell R. Anderson; M. Elizabeth Craig; Jean B. Keffeler; Elton A. Kuderer; H. Bryan Neel, III; Mary J. Page; Lawrence Perlman; Thomas R. Reagan; David K. Roe; Darrin M. Rosha; Stanley D. Sahlstrom; Ann J. Wynia; Julie Bleyhl; William E. Hogan, II; Hyon T. Kim; William R. Peterson; Nils Hasselmo, University of Minnesota President,

Appellants.

Order Denying Petition for Rehearing
and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Appendix C

The motion of The Board of Regents of the State of Iowa for leave to file brief amicus curiae in support of petition for rehearing en banc is denied as moot.

(5128-010199)

October 5, 2001

Order Entered at the Direction of the Court:

s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX D — RELEVANT STATUTES

MINNESOTA STATUTES
2000

UNIVERSITY CHARTER
LAWS 1851, CHAPTER 3

CHAP. III. — An act to incorporate the University of Minnesota, at the Falls of St. Anthony.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF THE TERRITORY OF MINNESOTA, That there shall be established in this Territory an Institution, under the name and style of the University of Minnesota:

Sec. 2. The proceeds of all land that may hereafter be granted by the United States to the Territory for the support of a University, shall be and remain a perpetual fund, to be called the "University Fund," the interest of which shall be appropriated to the support of a University, and no sectarian instruction shall be allowed in such University.

Sec. 3. The object of the University shall be to provide the inhabitants of this Territory with the means of acquiring a thorough knowledge of the various branches of Literature, Science and the Arts.

Sec. 4. The government of this University shall be vested in a Board of twelve Regents, who shall be elected by the Legislature as hereinafter provided.

Sec. 5. The members of the Board of Regents shall be elected at the present session of the Legislature, and shall be

divided into classes, numbered one, two, and three; class numbered one shall hold their offices for two years; class numbered two, for four years, and class numbered three, for six years, from the first Monday of February, one thousand, eight hundred and fifty one; biennially thereafter there shall be elected in Joint Convention of both branches of the Legislature, four members to supply the vacancies made by the provisions of this section, and who shall hold their offices for six years respectively.

Sec. 6. Whenever there shall be a vacancy in the office of Regents of the University, from any cause whatever, it shall be the duty of the Governor to fill such office by appointment, and the person or persons so appointed, shall continue in office until the close of the session of the Legislature, then next thereafter, and until others are elected in their stead.

Sec. 7. The Regents of the University and their successors in office, shall constitute a body corporate, with the name and style of the "Regents of the University of Minnesota," with the right as such, of suing and being sued, of contracting and being contracted with, of making and using a common seal, and altering the same at pleasure.

Sec. 8. The Regents shall appoint a Secretary, a Treasurer, and a Librarian, who shall hold their respective offices during the pleasure of the Board. It shall be the duty of the Secretary to record all the proceedings of the Board and carefully to preserve all its books and papers; the Treasurer shall keep a true and faithful account of all moneys received and paid out by him, and shall give such bonds for

the faithful performance of the duties of his office as the Regents may require.

Sec. 9. The Regents shall have power, and it shall be their duty to enact laws for the government of the University; to elect a Chancellor, who shall be ex-officio, President of the Board of Regents, or when absent, or previous to the election of such Chancellor, the Board may appoint one of their own number President pro. tem. They may also appoint the requisite number of professors and tutors and such other officers as they may deem expedient; also to determine the amount of their respective salaries; Provided, That the salaries thus determined, shall be submitted to the Legislature for their approval or dissent.

Sec. 10. The University shall consist of five Departments: The Department of Science, Literature and the Arts; The Department of Law; The Department of Medicine; The Department of the theory and practice of Elementary Instruction; The Department of Agriculture. The immediate government of the several Departments shall be entrusted to their respective Faculties; but the Regents shall have power to regulate the course of Instruction, and prescribe under the advice of the Professorships, the books and authorities to be used in the several Departments, and also to confer such degrees and grant such diplomas as are usually conferred by other Universities.

Sec. 11. The Regents shall have power to remove any officer connected with the Institution, when in their judgment the interest of the University requires it.

Appendix D

Sec. 12. The admission fee to the University and the charges for tuition in the several Departments thereof, shall be regulated and prescribed by the Board of Regents; and as soon as in their opinion, the income of the University fund will permit, tuition in all of the Departments shall be without charge to all students in the same, who are residents of the Territory.

Sec. 13. The University of Minnesota, shall be located at or near the Falls of Saint Anthony, and the Regents as soon as they may deem expedient, shall procure a suitable site for the erection of the University buildings, and they may proceed to the erection of the same as soon as funds may be provided for that purpose, after such plan or plans as may be approved by a majority of said Board.

Sec. 14. The Regents shall have the power, and it shall be their duty, as soon as the requisite funds shall have been secured for that purpose, to establish a Preparatory Department of said University, and employ teachers for the same, who shall be qualified to give instruction in all the branches of learning usually taught in Academies; which Preparatory Department may be discontinued whenever the Regents may think proper, after the other Departments of said University shall have been established.

Sec. 15. The Regents are authorized to expend such portions of the fund, which by the provisions of this act, may come under their control, as they may deem expedient for the erection of suitable buildings, and the purchase of apparatus, a Library, and a Cabinet of Natural History; and the selection, management and control of all lands, which

may hereafter be granted by Congress for the endowment of said University, is hereby vested in the Board of Regents.

Sec. 16. The Regents shall make a report annually, to the Legislature at its regular session, exhibiting the state and progress of the University in its several Departments, the course of study, the number of professors and students, the amount of expenditures and such other information as they may deem proper, or may from time to time be required of them.

Sec. 17. Meetings of the Board may be called by any seven members thereof, at such time and place as they may deem expedient, and a majority of the said Board shall constitute a quorum for the transaction of business, but a smaller number may adjourn from time to time.

Sec. 18. The Regents, if they shall deem it expedient, may receive into connection with the University, any college within the Territory, upon application of the Board of Trustees; and such college so received, shall become a branch of the University, and be subject to the visitation of the Regents.

Sec. 19. No religious tenets or opinions shall be required to entitle any person to be admitted as a student in said University; and no such tenets or opinions shall be required as a qualification for any professor, tutor or officer of said University.

Sec. 20. The Legislative Assembly may at any time, alter, amend, modify or repeal this act.

* * *

Appendix D

42 U.S.C. § 2000e

§ 2000e. Definitions

For the purposes of this subchapter —

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

* * *

Appendix D

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

* * *

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [43 U.S.C.A. § 1331 et seq.].

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and

women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

(*l*) The term "complaining party" means the Commission, the Attorney General, or a person who may bring an action or proceeding under this subchapter.

(m) The term "demonstrates" means meets the burdens of production and persuasion.

(n) The term "respondent" means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity subject to section 2000e-16 of this title.

* * *

Appendix D

42 U.S.C. § 2000e-2

§ 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer —

> **(1)** to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> **(2)** to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an

employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

* * *

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an

employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

* * *

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion,

sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

(k) Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if —

> **(i)** a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or
>
> **(ii)** the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

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(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled

substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act [21 U.S.C.A. § 801 et seq.] or any other provision of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

(*l*) Prohibition of discriminatory use of test scores

It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

Appendix D

(n) Resolution of challenges to employment practices implementing litigated or consent judgments or orders

(1)(A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws —

> **(i)** by a person who, prior to the entry of the judgment or order described in subparagraph (A), had —
>
> > **(I)** actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and
> >
> > **(II)** a reasonable opportunity to present objections to such judgment or order; or

(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

(2) Nothing in this subsection shall be construed to —

(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;

(B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;

(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

(D) authorize or permit the denial to any person of the due process of law required by the Constitution.

(3) Any action not precluded under this subsection that challenges an employment consent judgment or order described in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of Title 28.

* * *

42 U.S.C. § 2000e-5

§ 2000e-5. Enforcement provisions

(a) Power of Commission to prevent unlawful employment practices

The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

* * *

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from

the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful

employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court —

> **(i)** may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

* * *

(j) Appeals

Any civil action brought under this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, Title 28.

(k) Attorney's fee; liability of Commission and United States for costs

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

* * * *

APPENDIX E — EXCERPTS FROM UNIVERSITY OF MINNESOTA BOARD OF REGENTS POLICY

[Omitted here but submitted separately as Lodging]

Supreme Court, U.S.
FILED
FEB - 7 2002
OFFICE OF THE CLERK

No. 01-995

IN THE

Supreme Court of the United States

THE UNIVERSITY OF MINNESOTA AND REGENTS OF THE UNIVERSITY OF MINNESOTA; WENDELL R. ANDERSON, *et al.*,

Petitioners,

v.

IAN MAITLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. The Eighth Circuit Court of Appeals examined the nature of the Board of Regents of the University of Minnesota, and after a careful analysis of its powers and functions, concluded that the Regents were not "legislators." Was the Eighth Circuit wrong?

2. Is Title VII's prohibition of sex discrimination by state employees unconstitutional?

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42 U.S.C. § 2000e, *et seq.* 1

STATEMENT OF THE CASE

Respondent Ian Maitland, a professor at the University of Minnesota, brought this sex discrimination claim under 42 U.S.C. § 1983 and 42 U.S.C. § 2000e, *et seq.* against the University of Minnesota, its Regents and President. Respondent challenged a sex-based pay plan which the University adopted because of the settlement of a class action lawsuit. Specifically, the University agreed to enter into a lawsuit settlement under which $3,000,000 in salary increases would be distributed exclusively to female academic employees:

> [E]ach beneficiary received an increase in salary whether her current salary was lower or higher than the salaries of similarly situated males. Male academic employees were not eligible for these increases.

Maitland v. University of Minnesota, 43 F.3d 357, 360 (8th Cir. 1994).

This case has made three trips to the Eighth Circuit Court of Appeals. In the first, the Eighth Circuit rejected Petitioner's attempt to dismiss the case and found that "it was readily foreseeable that the [settlement] might precipitate sex discrimination claims by Maitland or other male academic employees at the University." *Id.* at 364. In 1996, Petitioners again moved to dismiss based upon qualified immunity. The Eighth Circuit again refused to dismiss the case and found that fact issues remained for trial because the sex-based pay plan was adopted despite the fact that "there was a multiple regression analysis that showed no statistically significant salary discrimination." *Maitland v. University of*

Minnesota, 155 F.3d 1013, 1019 (8th Cir. 1998). The Eighth Circuit further found that the Petitioners "had strong reason to believe that a likely result of the plan would be to create a salary imbalance in favor of female academic employees." *Id.*

In 2000, Petitioners brought additional motions to dismiss based upon legislative and Eleventh Amendment immunity. The District Court denied both motions and the Eighth Circuit affirmed. *Maitland v. University of Minnesota*, 260 F.3d 959 (8th Cir. 2001). Petitioners have now requested that this Court review both the legislative and Eleventh Amendment immunity issues raised below.

SUMMARY OF ARGUMENT

The Regents of the University of Minnesota are not entitled to legislative immunity. In *Stanley v. Magrath*, 719 F.2d 279 (8th Cir. 1983), the Eighth Circuit Court of Appeals reviewed the structure and function of the Board of Regents and determined that its duties were primarily those of administrators and not a legislative body. Subsequent to this Court's decision in *Bogan v. Scott-Harris*, 523 U.S. 44 (1998), the Eighth Circuit Court of Appeals reaffirmed its finding that the University of Minnesota Board of Regents does not have the functional characteristics of a legislative body. *Maitland v. University of Minnesota*, 260 F.3d at 962-63. These Eighth Circuit opinions are consistent with the Court's legislative immunity opinions, including *Bogan*. There is no compelling reason why this Court should review the Eighth Circuit's fact-laden determination that the Board of Regents is an administrative, and not a legislative, body.

Defendant's claim of Eleventh Amendment immunity also does not warrant review by this Court. This Court's

decision in *Fitzpatrick v. Bitzer*, 422 U.S. 445 (1976) squarely stated that Title VII abrogates Eleventh Amendment immunity with respect to a claim of sex discrimination under Title VII of the Civil Rights Act. This Court's most recent opinions regarding the Eleventh Amendment have not called *Fitzpatrick* into question, and no circuit court has ever said that it does. Nor has any circuit court suggested that the prohibitions on intentional race or sex discrimination in Title VI, Title VII, or Title IX are outside of Congress' authority under Section 5.

Petitioner's allegation that certain elements of a 42 U.S.C. § 1983 claim under the Constitution might vary from Title VII's provisions for disparate impact, "mixed motives," and bona fide occupational qualification is irrelevant. Respondent is making no disparate impact claim, mixed motive, or other type of claim that varies from an action based upon the equal protection clause under 42 U.S.C. § 1983.

REASONS FOR DENYING THE WRIT

I. The University Of Minnesota Board Of Regents And Its President Cannot Avail Themselves Of Legislative Immunity In This Case.

In order to shield actions with legislative immunity, a court must first determine whether the defendants are "legislators," *Bogan v. Scott-Harris*, 523 U.S. 44, 53 (1998), or the "functional equivalent" of a legislative body. *Id.* Assuming that the group in question is determined to be a legislative body, a court must still determine whether the acts in question are legislative in nature. Whether an act is legislative "turns on the nature of the act, rather than on the motive or intent of the official performing it." *Id.* at 54.

With respect to what constitutes a "legislative body" and what constitute "legislative acts," *Bogan* did not change the law in any respect. It merely extended these concepts to a local legislative body:

> It is well established that federal, state, and regional legislators are entitled to absolute immunity from civil liability for their legislative activities. In this case, petitioners argue that they, as local officials performing legislative functions, are entitled to the same protection. They further argue that their acts of introducing, voting for, and signing an ordinance eliminating the government office held by respondent constituted legislative activities. We agree on both counts . . .

Id. at 46.

A. The University Board of Regents is not a legislative body.

In *Stanley v. Magrath*, 719 F.2d 279 (8th Cir. 1983), the Eighth Circuit Court of Appeals determined that the University of Minnesota Regents are not legislators. The Eighth Circuit employed a functional analysis and determined as follows:

> The Regents do not qualify as legislators within the meaning of the legislative-immunity doctrine. Although the Regents are given the power "to enact laws for the government of the University" (Territorial Laws of Minnesota, 1851, Chapter 3, Section 9, applicable today by virtue of the Minnesota Constitution, Article XIII,

> Section 3), they are essentially administrators who oversee the operation of a state educational institution. . . . Their rule making powers are limited solely to the regulation of that institution. That state law may characterize their activity as "legislative" for some purposes is not controlling in the interpretation of a federal statute such as 42 U.S.C. § 1983.

Stanley v. Magrath, 719 F.2d at 284. The Eighth Circuit's recent decision in this case reaffirming *Stanley* rightly concludes that *Bogan* does not undercut *Stanley*'s finding with respect to the Board of Regents. *Maitland v. University of Minnesota*, 260 F.3d at 962-63. There is nothing in Stanley to indicate that the University Board of Regents was precluded from legislative immunity because it was viewed as too "local" (the only issue on which *Bogan* could conceivably have had any effect on *Stanley*'s continuing value). *Stanley* simply stands for the proposition that the Regents — whether viewed as a state, regional, or local group — do not qualify as "legislators" because of the limited administrative functions they serve and the lack of parallels between their work and constituencies and the work and constituencies of city council members, county commissioners, state legislators, or members of Congress.

The University describes the Board of Regents powers as "discretionary," involving "policy making," having "budgetary implications," and being "prospective" in nature. These vague attributes, however, are not sufficient to address the critical threshold question of whether such acts were performed by "legislators." Every public and private institution is governed by individuals who, to one extent or another, undertake "discretionary" acts set "policy," deal with

budgets and plan for the future. Such activities, however, do not make all such individuals "legislators." A "legislator" is ordinarily directly elected and subject to recall by the general population within their jurisdiction (e.g., state legislatures, township boards, city councils, local school boards — but not the University Regents), has taxing authority (*cf. Winberg v. University of Minnesota*, 499 N.W.2d 799, 802 (Minn. 1993) (University of Minnesota, unlike other Minnesota government entities, has no power to tax)), or is responsible for quintessentially legislative functions, such as the Regional Board in Lake Country Estates:

> [W]e considered the regional legislators [in Lake Country Estates] to be the functional equivalents of local legislators, noting that the regional agency was "comparable to a county or municipality" and that the function of the regional agency, regulation of land use, was "traditionally a function performed by local governments."

Bogan, 523 U.S. at 53. The Board in Lake Country has no parallels to the University Board of Regents. The Board of Regents was involved in settlement of a lawsuit and initiating a sex-based pay plan. The experience of litigating, settling, and paying money related to lawsuits is part of administering any public or private institution, and is not uniquely legislative.

There is no reason for this Court to exercise its discretion to review this case. The Eighth Circuit's determination that the University of Minnesota Regents are "essentially administrators," is by its nature a fact-laden determination, a determination made both before and after *Bogan*. If the Eighth Circuit had misapplied the law by, for example,

determining that the Regents are "too local" to avail themselves of the legislative immunity doctrine, Petitioners might have a more persuasive case. As it is, every Board of Regents in every state likely has a different design and different powers. With respect to the University of Minnesota Board of Regents, the Eighth Circuit has adequately settled this issue twice, and there is no conflict with any other circuit.[1]

---

1. Petitioner attempts to create a circuit split by arguing as follows:

> [A]ll other federal and appellate courts addressing the issue of legislative immunity have applied *Bogen* differently than has the Eighth Circuit. Every other circuit considering the issue has interpreted *Bogen* to require a functional analysis of the specific legislative action taken and not a categorical determination that the governmental body at issue is not legislative.

Petition, pp. 13-14. This misstates the law in *Bogen*. *Bogen* restates the well established requirement that, for legislative immunity to apply, a court must first determine whether the defendants are "legislators." If the court answers the first question in the affirmative, it must then determine that the acts in question are "legislative acts." The Regents failed the first "categorical" test and were found not to be a "legislative body." The Eighth Circuit has reviewed the "function" of the Board of Regents and determined it to be "essentially administrative." This determination was made after reviewing the Board's various powers and responsibilities and was not casual labeling.

B. The Regents' acts that gave rise to this litigation were not legislative acts.

Assuming, arguendo, that the Board of Regents are "legislators," the defendant's request for absolute legislative immunity still must fail because the Regents' actions at issue in this lawsuit were not "legislative activities."

Not every action by a legislator is absolutely immune. The Court in *Bogan* found the city council protected by legislative immunity because the acts in question were quintessentially legislative in nature. These acts included voting for an ordinance, signing the ordinance into law, and introducing a budget. *Bogan*, 523 U.S. at 55. Petitioners argue that the acts involved in settling a lawsuit are "discretionary," "set policy," "had budgetary implications," and were "prospective." Terms such as these are amorphous and can be manipulated to apply to a wide variety of acts which are not uniquely legislative. Every administrative act of those who lead institutions involves some degree of "discretion," will include some policy and budgetary implications, and will be prospective in some sense of the word. But the settlement of a lawsuit is in essence an ad hoc reaction to the pressures of litigation. Like any other expense, the settlement will have some effect on some budget and may be "prospective" in the sense that some settlement payment is made after the settlement is approved. This does not change the fact, however, that most individuals involved in managing an institution must face litigation and litigation-related issues. Litigation settlements are not uniquely legislative.

Even if the settlement of lawsuits was in some general sense a uniquely legislative activity, this general principle would not apply to the University of Minnesota Board of

Regents. The Regents policies attached to Petitioners' addendum show that the Board of Regents were, at most, to be "consulted" on the settlement of a lawsuit. Petition, p. 4 ("As to settlement of claims, Regents' Policy requires that the President consult with the Board . . .") Consulting — as opposed to public deliberation and voting — is not in the least legislative, let alone uniquely legislative. Petitioners have never produced minutes or any other record of any vote on the proposed settlement. Apparently the "consulting" on the settlement occurred in a secret session protected by attorney-client privilege. Secret votes outside of the public record are clearly not legislative in nature.

The District Court and Eighth Circuit Court of Appeals were correct to deny Petitioners' motion to dismiss based upon legislative immunity.

II. Title VII Claims Against The State Are Not Barred By Eleventh Amendment Immunity.

Petitioners incorrectly state that this Court's decision in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) "left open" the determination of whether the Eleventh Amendment bars sex discrimination cases under Title VII against states. *Fitzpatrick* stated the issue to be resolved as follows:

> In the 1972 Amendments to Title VII of the Civil Rights Act of 1964, Congress acting under § 5 of the Fourteenth Amendment, authorized federal courts to award money damages in favor of a private individual against the state government, found to have subjected that person to employment discrimination on the basis of "race, color, religion, sex, or national origin." The principal question presented by these cases is whether, as against the

> shield of sovereign immunity afforded the state by the Eleventh Amendment (citation omitted), Congress has the power to authorize federal courts to enter such an award against the state as a means of enforcing the substantive guarantees of the Fourteenth Amendment. . . . we grant certiorari to resolve this important Constitutional question.

Fitzpatrick v. Bitzer, 427 U.S. at 447-48. Petitioners now argue that *Fitzpatrick* left open the very question it set out for itself. Contrary to Petitioners' suggestion, *Fitzpatrick* stands in direct conflict with Petitioners' argument, nothing in recent cases from this Court has affected the validity of *Fitzpatrick*, and no circuit split exists. No circuit court has suggested that the prohibitions on intentional race or sex discrimination under Titles VI, VII or IX are outside of Congress' authority under Section 5 or that *Fitzpatrick* is now in question.

The University argues that this Court's recent Eleventh Amendment opinions require a substantial legislative record before Eleventh Amendment immunity can be set aside, and that there is an absence of legislative history establishing that states have discriminated on the basis of sex. The Eighth Circuit Court of Appeals, however, in *Okruhlik v. University of Arkansas*, 255 F.3d 615, 624-25 (8th Cir. 2001), reviewed the extensive legislative record supporting Title VII's prohibitions against state-sponsored sex discrimination and found a more than adequate legislative basis for Title VII's remedies.

Petitioners counter that, though there may be some general legislative support for Title VII's application to state defendants, the support does not extend to this case because

the legislative history does not document discrimination by states against men in employment. The Eighth Circuit opinion in this case, however, makes it clear why a legislative record favoring every conceivable plaintiff is not necessary to support title VII's application to the states:

> Under the Defendants' reasoning, if a non-African-American minority employee brought a race-discrimination claim against his state employer under Title VII, and the legislative history of Title VII was devoid of any findings specific to that employee's minority group, the legislation would not abrogate the state's Eleventh Amendment immunity and the employee would be without recourse under Title VII. (Citations omitted). Even putting aside the rather obvious Equal Protection Clause problems to one side, we do not think that the defendants' reasoning afford us a proper approach towards application of the Eleventh Amendment.

Maitland v. University of Minnesota, 260 F.3d 959 at 965 n.5.

More importantly, even if the legislative history is determined to be lacking, such history is not determinative, or even of much help at all when the Court is dealing with conduct directly violative of the Constitution's Equal Protection Clause. The Court's analysis in recent cases underscores this point. In *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), this court first went through an extensive analysis demonstrating that the Age Discrimination in Employment Act prohibited much conduct not violative of the constitution. *Id.* at 82-87. Only after that did it examine the legislative history to determine if the ADEA

was nonetheless reasonable "prophylactic legislation" against widespread violations of the equal protection clause. *Id.* at 87-90. If the absence of findings of widespread Constitutional violations in the legislative history were dispositive, the first part of this analysis in *Kimel* would have been gratuitous.

Similarly, in *Fla. Pre-paid Post-secondary Educ. Expense Bd. v. College Save. Bank*, 527 U.S. 627 (1999), this Court first demonstrated that Congress was not responding to a widespread pattern of patent violations by state government in passing the Patent and Plant Variety Protection Remedy Clarification Act. *Id.* at 639-642. But even after that demonstration, this Court nonetheless conceded that "if the due process clause protects patents, we know of no reason why congress might not legislate against their deprivation without due process under § 5 of the Fourteenth Amendment." *Id.* at 642. It was only because the Congressional statute did not do that, but rather permitted a federal claim before any intentional deprivation by the State, that the act was beyond Congress's § 5 power. *Id.* at 642-43. In short, the absence of findings of constitutional violations is not sufficient to find that Congress exceeded it § 5 authority. There must also be a finding that the statute itself goes beyond violations of the Constitution. *See also Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001) ("§ 5 legislation *reaching beyond the scope of Section 1's actual guarantees* must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.' "). (Emphasis supplied.)

Unlike the Religious Freedom Restoration Act (*City of Boerne v. Flores*, 521 U.S. 507 (1997)), Patent Protection Act (*Florida Pre-Paid*), Americans with Disability Act (*Kimel*), Violence Against Women Act (*United States v. Morrison*, 529

U.S. 598 (2000)), and Americans with Disabilities Act (*Garrett*), Title VII's prohibition against sex discrimination is a close fit with the Fourteenth Amendment's prohibition against the denial of equal protection. Almost all established claims of sex discrimination will violate the Constitution. As a result, a search of the legislative record is not required by Title VII's proscriptions against sex discrimination. Title VII is not "prophylactic" legislation; it is direct implementation of the guarantee of equal protection. *Kimel* itself — the case which precipitated Petitioner's Motion to Dismiss based upon the Eleventh Amendment — specifically distinguished between the heightened scrutiny applicable to sex and race discrimination, and the "rational basis" scrutiny accorded age discrimination claims:

> Age classifications, *unlike governmental conduct based on race or gender*, cannot be characterized as "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy . . . in contrast [to the rational basis review applied to age discrimination] when a state discriminates *on the basis of race or gender*, we require a tighter fit between the discriminatory means and the legitimate ends they serve.

Kimel, 528 U.S. 62 at 84 (emphasis added). Title VII claims of sex discrimination prohibit very little conduct that does not violate the Constitution. As such, there should be no question that Eleventh Amendment immunity is not available to the states as a defense to such actions.

Petitioners also argue that some of the remedies and defenses available in a Title VII claim are not identical to

those available for a constitutional claim under 42 U.S.C. § 1983. Specifically, Petitioners allege that a "disparate impact" approach to liability under Title VII does not have a parallel in the Constitution, the "mixed motive" Title VII claim would not be recognized in a case based solely on the Constitution and the Bona Fide Occupational Qualification ("BFOQ") varies from the similar defense available in a § 1983 action. This argument is irrelevant to this case. Respondent has not brought a disparate impact claim, has not alleged "mixed motive," nor have Petitioners asserted a BFOQ defense. Respondent's claim for intentional discrimination is without mixed motives. The lower court in this matter has established that Petitioners' intentionally established a sex based pay plan under which all women received raises and men received none. There is no reason for this court to opine on the constitutionality of some application of Title VII not before it. *Griffin v. Breckenridge*, 403 U.S. 88, 104 (1971) ("we need not find the language of § 1985(3) now before us constitutional in all its possible applications in order to uphold its facial constitutionality and its application to the Complaint in this case").

CONCLUSION

The Eighth Circuit's conclusion that the Board of Regents is an administrative body is a fact specific conclusion without consequences for other cases. The Eighth Circuit did not misapply *Bogan*. The Regents of the University of Minnesota are not "legislators" and did not engage in "legislative acts" when they settled the lawsuit that gave rise to this sex discrimination claim.

Sex discrimination claims under Title VII are a close fit with the constitutional guarantee of equal protection. Thus, Title VII prohibitions apply to a state institution irrespective of the Eleventh Amendment. Not one lower court anywhere has ever suggested that Title VII's prohibition of intentional sex discrimination is unconstitutional or that *Fitzpatrick* is no longer good law.

Respectfully submitted,

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IN THE

Supreme Court of the United States

THE UNIVERSITY OF MINNESOTA AND REGENTS OF THE UNIVERSITY OF MINNESOTA; WENDELL R. ANDERSON, *et al.*,

Petitioners,

v.

IAN MAITLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF

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I. The Court of Appeals' Categorical Rule on Legislative Immunity is Inconsistent with This Court's Decisions.

Respondent's Brief in Opposition does not dispute that the court of appeals has ruled that members of the elected body governing the University of Minnesota are never entitled to the protection of legislative immunity, regardless of the nature of their collective action. That categorical ruling directly contradicts this Court's legislative immunity decisions, which, as pointed out in the Petition, hold that "[a]bsolute legislative immunity attaches to *all* actions taken 'in the sphere of legitimate legislative activity,'" *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998) (citation omitted) (emphasis added), and that "[w]hether an act is legislative turns on the nature of the act. . . ." *Id.* In nonetheless arguing against granting the Petition on this issue, Respondent makes two claims, neither of which is valid.

First, Respondent asserts that both the court of appeals' ruling below and its prior decision in *Stanley v. McGrath*, 719 F.2d 279 (8th Cir. 1983), were based on some fact-specific analysis of the actual functions and responsibilities of a particular entity and were not a categorical pronouncement covering a wide range of public governing bodies. This simply is not true. *Stanley* contains no record-based fact-finding on this question. *See* 719 F.2d at 284-85. Instead, it relies upon a prior Eighth Circuit decision, *Williams v. Anderson*, 562 F.2d 1081 (8th Cir. 1977), which had determined — also categorically — that local school boards are not protected by the doctrine of legislative immunity. *See* 562 F.2d at 1101 & n.33. Similarly, the ruling below on which review is now sought undertook no analysis of the functions or responsibilities of the Regents or of any

other public university governing board.[1] Indeed, the Eighth Circuit made no mention whatsoever of the Regents' Policies, *see* Pet. at 4-5, 10-11, which by themselves plainly contradict *Stanley*'s conclusory assertions. Instead, the court of appeals simply considered itself bound by its inter-panel uniformity rule, under which it followed *Stanley*. Pet. App. at 7a. Quoting *Stanley*, the Eighth Circuit left no doubt about its categorical position regarding legislative immunity for any acts of such a body:

> The governing body of a state-supported institution of higher learning, we think, cannot qualify for such protection.

Pet. App. at 6a. As shown in the Petition, this categorical holding directly conflicts with this Court's recent decisions. The Eighth Circuit's declaration that it does not ("We find, however, that *Bogan* fails to illuminate the issue here and does not require us to rethink our holding in *Stanley*." Pet. App. at 7a.) warrants review by this Court.

Second, Respondent attempts to deflect attention from this important issue by asserting that, in any event, settlements of claims against public institutions cannot be legislative in nature because they are not "uniquely" or "quintessentially" legislative acts. This argument is incorrect, both with regard to the facts of this case (as shown in the Petition at 15-18) and in general. The standard this Court

1. Indeed, neither the district court whose decision was on appeal to the Eighth Circuit in this case, *see* Pet. App. at 22a-23a, nor even the district court in *Stanley*, *see* 719 F.2d at 284 n.9 (noting district court did not reach this issue), has ever conducted a fact-based analysis of the functions or responsibilities of the Regents (or of any other public university governing body) to substantiate the court of appeals' categorical rule.

has established does not depend on uniqueness or quintessence; it depends on whether the action in question was taken "in a field where legislators traditionally have power to act." *Bogan*, 523 U.S. at 56 (citation omitted). Respondent would have this Court ignore well over two hundred years of American legal tradition. Beginning in the early 1700s, allowance or settlement of claims of individuals against governments in America was the exclusive prerogative of locally elected legislatures. James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims against the Government*, 91 NW. U. L. REV. 899, 929-37 (1997). This tradition was maintained for over 250 years, until waivers of sovereign immunity became common in the 1970s, and is still retained in whole or in part in many States. *See, e.g.*, Pet. at 18 n.21. Moreover, in addition to the settlement of the lawsuit here, there is no doubt that the substantial restructuring of faculty salary policies and the accompanying new budget priorities approved by the Regents — the real basis of Respondent's complaint — were traditionally legislative acts. Thus, contrary to Respondent's assertion, the actions taken by the public governing board in this case were "traditionally" legislative in nature, taken in a field within which it had power to act. *See* Pet. at 4-5, 10, 15-18.

II. This Court Should Review the Court of Appeals' Determination that Title VII Validly Abrogates the States' Eleventh Amendment Immunity with Regard to Sex Discrimination Claims.

Respondent does not deny that the question whether Title VII validly abrogates Eleventh Amendment immunity in the context of sex discrimination claims made against

States is an important one, and that the court of appeals did not perform the analysis now required by this Court to answer it. Instead, Respondent asserts that this Court decided that question in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), *see* Br. in Opp. at 9-10, obviating the need to address the merits here. That premise is incorrect. The court of appeals itself recognized that the issue presented here was actually an "ancillary antecedent proposition that was assumed, but not decided, by the Court [in *Fitzpatrick*]," Pet. App. at 8a, and concluded "we agree with the defendants that *Fitzpatrick* did not squarely decide the issue . . ." Pet. App. at 9a.

The court of appeals was correct in that conclusion. This Court did not grant certiorari in *Fitzpatrick* to determine whether a sex discrimination claim on behalf of men was within Congress' Section 5 powers, *see* 427 U.S. at 448 (restating issue on which certiorari was granted), and the opinion contains no analysis of that issue. Rather, the issue decided in *Fitzpatrick* was about "relief"— whether retroactive monetary relief is an available remedy against a State when Congress does validly exercise its Section 5 powers. *Id.* The Court did not address the validity of the exercise of that authority in the context of the case before it. Indeed, the Court expressly noted that the State had challenged only the remedy, and had not raised the issue of whether Congress has authority under Section 5 to abrogate sovereign immunity by authorizing sex discrimination suits against States by men.[2] It is well established that "[t]he Court

2. The Court's footnote states:

> Apart from their claim that the Eleventh Amendment bars enforcement of the remedy established by Title VII in this case, respondent state officials do not contend that

(Cont'd)

often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions . . . and such assumptions . . . are not binding in future cases that directly raise the questions." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990).

Respondent also attempts to distract from the court of appeals' failure to apply the proper analysis by suggesting that it is "irrelevant" that remedies and defenses available under Title VII are not the same as those available for a constitutional claim because those remedies and defenses are not directly at issue in this case. But this Court's decisions teach otherwise. In *Kimel*, this Court struck down the ADEA under Eleventh Amendment analysis because, among other reasons, it permitted a BFOQ exception for age discrimination under certain circumstances and prohibited States from using age as a proxy for other characteristics. *See Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 86-88 (2000). Yet, those provisions were not at issue in the case. The employer did not argue for a BFOQ exception, and none of the plaintiffs argued that the State used age as a proxy for other characteristics. *See id.* at 69-72. Similarly, in *Garrett*, this Court struck down the ADA under Eleventh Amendment analysis because, among other reasons, it created disparate impact claims against States. *See Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 372-73 (2001). This Court determined that such a standard would not even be

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(Cont'd)

> the substantive provisions of Title VII as applied here [i.e., on behalf of men] are not a proper exercise of congressional authority under § 5 of the Fourteenth Amendment.

427 U.S. at 456 n.11.

permissible under the Constitution in a race discrimination case, and found that the ADA was not congruent and proportional. *See id.* Yet, neither plaintiff had asserted a disparate impact claim. *See id.* at 362-63. Thus, it is clear that an Eleventh Amendment analysis properly takes into account any statutory provisions which Congress has made applicable to the States, whether or not directly implicated by the particular facts of the case at hand. *See also Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savs. Bank*, 527 U.S. 627, 647 (1999); *City of Boerne v. Flores*, 521 U.S. 535, 534-35 (1997). This is so because only an analysis of the totality of available claims, remedies, and defenses can determine whether a statute is congruent and proportional under the requirements of the Constitution.

Finally, Respondent asserts that the absence of any history of state-sponsored discrimination against men — which absence he admits — "is not determinative, or even of much help at all," Br. in Opp. at 11, because, "[a]lmost all established claims of sex discrimination will violate the Constitution," Br. in Opp. at 13. Even assuming he were otherwise correct, Respondent completely overlooks the fact that, regardless of the existence of a legally congruent "close fit," the absence of a demonstrated pattern of discrimination by the State limits the remedies Congress may impose in derogation of the Eleventh Amendment. This Court's clearest and most recent pronouncement on this precise point is set forth as part of the statement of the holding in *Garrett*:

> [I]n order to authorize private individuals to recover money damages against the States, there must be a pattern of discrimination by the States which violates the Fourteenth Amendment, and

> the remedy imposed by Congress must be congruent and proportional to the targeted violation.

531 U.S. at 374. *See also id.* at 376 (Kennedy, J., concurring). Here, Respondent seeks to recover retroactive monetary relief from the State; whether *Garrett*'s requirement of a pattern of State discrimination applies to Title VII claims of men is an independently significant issue which warrants review, and is squarely presented.

In short, none of Respondent's arguments detract from the importance of the Eleventh Amendment question, or from the fact that it has not yet been decided by this Court. As the Petition has established, the Court should address this important question now.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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